# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

## No. 1045.

CHARLES A. CHASE, APPELLANT,

vs.

EMIL WETZLAR, SURVIVING EXECUTOR OF THE ESTATE OF GUSTAVE J. WETZLAR, DECEASED.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH 25, 1912.

(23,121)

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## Subpœna.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, [L.S.]

TO

EMIL WETZLER AND WILLIAM P. BROWN,
GREETING:

You are hereby commanded that you and each of you, personally appear before the Judges of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, in Equity, on first Monday of December, A. D., 1910, wherever the said Court shall then be, to answer a bill of complaint exhibited against you in the said Court by Charles A. Chase, and do further and receive what the said Court shall have considered in that behalf. And this you are not to omit under the penalty on you and each of you, of Two hundred and fifty Dollars.

WITNESS, The Honorable JOHN M. HARLAN, *Associate Justice* of the Supreme Court of the United States, at the Borough of Manhattan, in the City of New York, on the 27th day of October, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States of America, the one hundred and thirty-fifth.

JOHN A. SHIELDS,
Clerk.

FREDERIC W. FROST,
Solicitor for Complainant.

The defendants are required to enter appearance in the above cause, in the Clerk's office of this Court, on or before the first Monday of December, 1910, or the bill will be taken *pro confesso* against them.

J. A. S.,
Clerk.

4 **Bill.**

UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| CHARLES A. CHASE, a citizen of the State of Pennsylvania, vs. EMIL WETZLAR and WILLIAM P. BONN, alien subjects of the Emperor of Germany. | —Sessions 1910. No. —— In Equity. |

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES CIRCUIT COURT, FOR THE SOUTHERN DISTRICT OF NEW YORK:

CHARLES A. CHASE, of the City of Philadelphia, and State of Pennsylvania, and a citizen of the State of Pennsylvania, brings this his Bill against EMIL WETZLAR and WILLIAM P. BONN, alien subjects of the Emperor of Germany, residing in
6 Frankfort-on-the-Main, Germany, executors of the estate of Gustave J. Wetzlar, deceased, and therefore your orator complains and says:

FIRST.—That your orator, Charles A. Chase, is a resident of the City of Philadelphia, and State of Pennsylvania, and a citizen of the State of Pennsylvania, and the respondents, Emil Wetzlar and William P. Bonn, are residents of Frankfort-on-the-Main, Germany, and are alien subjects of the Emperor of Germany.

SECOND.—That one Gustave J. Wetzlar departed 7
this life on the Eighth day of November, 1898, having first made his Last Will and Testament bearing date of the 14th day of February, 1896, together with the Codicil thereto, bearing date of 20th day of April, 1898, a copy of which is hereto annexed, marked Exhibit "A" and made a part of this Bill of Complaint. That the said Gustave J. Wetzlar was at the time of his decease a resident of the City and County of New York.

THIRD.—That on the First day of February, 1899, the said Will was duly probated in the Surrogate's Court of the County of New York, in the City of 8
New York, and there recorded in Liber 616 of Wills, at page 269, and following. That Letters Testamentary were thereupon issued to the said Emil Wetzlar and William P. Bonn, when the said executors thereupon took upon themselves the duties of administering said estate by fulfilling duties of said estate, and the said executors collected and received the assets of the estate and set aside and held one-sixth of the residuary estate in accordance with provisions of the Fourth paragraph of the aforementioned Will. That they invested the said one-sixth residuary share in railroad bonds and held the said bonds in the City of New 9
York as executors, subject to the jurisdiction of your Honorable Court.

FOURTH.—Your orator further shows that under and by virtue of the Fourth paragraph of the aforementioned Will, the said Julius G. Wetzlar is entitled to receive a sixth part of the principal of the testator's residuary estate upon attaining the age of twenty-five years. That the said Julius G. Wetzlar attained the said age of twenty-five years on August 23, 1908, and on that day became entitled to receive a one-sixth part of the entire resid-

10 uary estate, which one-sixth part, your orator is advised, believes and expects to prove, exceeds the sum of $100,000.

FIFTH.—That the said Julius G. Wetzlar assigned, transferred and set over to Robert C. Banes, Trustee of the Will and Testament of Charles H. Banes, deceased, all his right, title and interest of, in and to an undivided one-third interest of the said Julius G. Wetzlar in the estate of the said Gustave J. Wetzlar by deed of assignment, dated the 31st day of March, 1905, a copy of which is attached hereto, marked Exhibit "B" and made a part of
11 this Bill of Complaint. Said assignment was duly recorded in the office of the Surrogate of the County of New York, in Liber 1 of Conveyances and Mortgages of Interests in Decedents' Estates, page 451. That on the said 31st day of March, 1905, the said Julius G. Wetzlar made and executed his promissory note for the sum of $5,000, bearing interest at six per cent., a copy of which is hereto attached, marked Exhibit "C" and made a part of this Bill of Complaint. That the said assignment marked Exhibit "B" was made, executed and delivered as collateral security to the said note. That on the 31st day of March, 1906, the date of the ma-
12 turity of the said note, there was due and payable to the said Robert C. Banes, Trustee as aforesaid, the full principal of said note, together with interest, amounting to $5,300.00, but no payment on account of the said principal or interest amounting to the said sum of $5,300.00 was paid to Robert C. Banes, Trustee as aforesaid, by the said Julius G. Wetzlar or by anyone on his behalf. That thereafter, on or about the 11th day of February, 1909, there was still due to Robert C. Banes, Trustee as aforesaid, the full principal sum of $5,000.00, with interest thereon, none of which had been paid by the said Julius G. Wetzlar. That on or about

the 11th day of February, 1909, the said Robert C. Banes, Trustee as aforesaid, gave notice to the said Julius G. Wetzlar of his purpose and intention to expose for sale all the one-third right, title and interest aforesaid of the said Julius G. Wetzlar in and to the said Estate of Gustave J. Wetzlar, transferred and assigned to Robert C. Banes, Trustee as aforesaid, by the said assignment, marked Exhibit "B," a copy of which notice is hereto annexed marked Exhibit "D," and made a part of this Bill of Complaint. Service of this notice was made by mailing a copy by registered mail to the said Julius G. Wetzlar, addressed in accordance with the terms of the said note. 13 14

SIXTH.—That in accordance with the said notice and in accordance with, and acting by virtue and under the authority of the said note marked Exhibit "C," Robert C. Banes, Trustee as aforesaid, did on the 24th day of February, 1909, offer at public sale, through the Auctioneer firm of Barnes & Lofland, in the City of Philadelphia, all the one-third right, title and interest aforesaid of the said Julius G. Wetzlar of, in and to the estate of Gustave J. Wetzlar as transferred and assigned by the assignment marked Exhibit "B." That one Elmer G. Parsley thereupon made a bid of $3,000 for the said one-third right, title and interest, which said bid of $3,000 was the highest and best bid made, and thereupon he was declared by the auctioneer the purchaser thereof. Thereafter, on the 20th day of March, A. D. 1909, in accordance with the said note and the said sale received from the said Robert C. Banes, Trustee as aforesaid, a deed of assignment, the said deed of assignment being executed by the said Robert C. Banes, Trustee as aforesaid, by virtue of the authority contained in the said note, and being a complete transfer and conveyance to the said Elmer G. Parsley 15

16 of all the one-third right, title and interest of the said Julius G. Wetzlar, conveyed by the said assignment marked Exhibit "B." A copy of the said assignment made to the said Elmer G. Parsley as aforesaid is hereto attached, marked Exhibit "E" and made a part of this Bill of Complaint. The said assignment was duly recorded in the Office of the Surrogate of the County of New York, in Liber 7 of Conveyances and Mortgages of Interests, in Decedents' Estates, page 117, on the 6th day of May, 1909. That on the 20th day of March, 1909, the said Elmer G. Parsley by deed of assignment did transfer and convey absolutely to the said Rob-
17 ert C. Banes individually all of the one-third right, title and interest aforesaid of the said Julius G. Wetzlar in and to the residuary estate of the said Gustave J. Wetzlar. Said assignment was duly recorded in the Office of the Surrogate of the County of New York, in Liber 7 of Conveyances and Mortgages of Interests in Decedents' Estates, page 112, on the 6th day of May, 1909. A copy of the said assignment is hereto attached marked Exhibit "F" and made a part of this Bill of Complaint.

That on the 20th day of June, 1910, the said Robert C. Banes by deed of assignment did transfer and convey absolutely to your Orator all of
18 the one-third right, title and interest aforesaid of the said Julius G. Wetzlar in and to the residuary estate of the said Gustave J. Wetzlar. A copy of said assignment is hereto attached marked Exhibit "G" and made a part of this Bill of Complaint.

SEVENTH.—That by virtue of the said sale had at auction and the conveyance made to your Orator thereof, your Orator became vested with and is entitled to immediate possession of the said one-third of one-sixth of the residuary estate.

EIGHTH.—Your Orator further shows that the 19
defendants Emil Wetzlar and William P. Bonn, executors of the estate of Gustave J. Wetzlar, deceased, as aforesaid, have neglected and refused to pay to your Orator the said one-third of one-sixth of the residuary estate, as aforesaid. And your Orator well hoped that the said Emil Wetzlar and William P. Bonn would have complied with said reasonable request of your Orator as in equity and good conscience they should have done.

All which actions and doings of said Emil Wetzlar and William P. Bonn are contrary to equity and good conscience and done to the manifest wrong, injury and oppression of your Orator. In 20
consideration whereof and for as much as your Orator is without adequate remedy in the premises to and by the strict rules of the common law and can only obtain relief in this Honorable Court where matters of this nature are properly cognizable and relievable; to the end, therefore, that the said Emil Wetzlar and William P. Bonn may without oath, to the best and utmost of their respective knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated and they and each of them distinctly interrogated there- 21
to, and that your Orator may be declared entitled to the immediate possession of one-third of one-sixth of the residuary estate of Gustave J. Wetzlar, deceased, and also to payments of income of the said one-third interest from August 23, 1908, and may pay your Orator the said portion of the said share of Julius G. Wetzlar as may be found to have been unlawfully withheld or diverted from him and that your orator may have such further and general relief in the premises as the nature of the case may require and shall be agreeable to equity and good conscience.

22 NINTH.—And your Orator further prays that the Court may issue a writ of subpœna to the defendants above named, Emil Wetzlar and William P. Bonn, thereby commanding them and each of them at a certain time and under a certain penalty therein to be limited, personally to appear before this Honorable Court and then and there full, true and perfect answers make to all and singular the premises and further to stand to, perform and abide such other or further order, direction and decree herein as to this Honorable Court shall seem meet.

And he will ever pray, etc.

CHARLES A. CHASE.

23 FREDERIC W. FROST,
Solicitor and of Counsel for Complainant,
60 Wall Street,
New York City.

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UNITED STATES CIRCUIT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK.

| | | |
|---|---|---|
| 24 CHARLES A. CHASE, a citizen of the State of Pennsylvania,<br>vs.<br>EMIL WETZLAR and WILLIAM P. BONN, alien subjects of the Emperor of Germany. | } | Sessions 1910.<br>No.<br>In Equity. |

STATE OF PENNSYLVANIA, }
County of Philadelphia, } ss.:

CHARLES A. CHASE, being duly sworn according to law, deposes and says: That he is the petitioner in the above-entitled Bill in Equity; that the Bill

is filed to determine disputed claims to a fund 25
which the defendants hold as executors and trustees within the jurisdiction of this Court, and subject thereto; that the defendant, Emil Wetzlar, is an alien subject of the Emperor of Germany, residing in Frankfort-on-the-Main, Germany; that the defendant, William P. Bonn, is an alien subject of the Emperor of Germany, residing in Frankfort-on-the-Main, Germany. That neither of said defendants are to be found within this district, and neither one has voluntarily appeared in this action.

(Sgd.) CHARLES A. CHASE.

Sworn to and subscribed before me this 11th day of October, A. D. 1910. } 26

JACOB LIFFMAN,
[SEAL] Notary Public,
My commission expires Feb. 5th, 1911.

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UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES A. CHASE,
Complainant,

vs.

EMIL WETZLER *et al.*,
Defendants.

——— Sessions 27
1910.
No. ———
In Equity.

## Decree.

Before ALFRED C. COXE, *U. S. Cir. J.*

AND NOW, TO WIT, this 25th day of October, A. D. 1910, upon motion of Frederic W. Frost, At-

torney for complainant, it appearing to the Court,
28 both by the averments contained in the Bill in Equity filed in the above-entitled cause, and by the affidavit of Charles A. Chase, complainant in said cause, that the suit was commenced to enforce equitable liens upon, or claims to the title to personal property within this District, and that all of the defendants are not inhabitants thereof, IT IS ORDERED, AND DECREED, that the defendants, Emil Wetzlar and William P. Bonn, shall appear, plea, answer or demur to the said Bill on or before the 12th day of December, 1910, and that a certified copy of this Order and of the Bill shall be served upon said defendants wherever found, on or before
29 the 25th day of November, 1910.

ALFRED C. COXE,
U. S. Cir. Judge.

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## Exhibit A.

I, GUSTAVE J. WETZLAR, of the City of New York, a naturalized citizen of the United States, do hereby make, publish and declare this to be my last Will and Testament, hereby revoking all former wills by me at any time made.

30 FIRST.—I direct my executors hereinafter named as soon after my death as practicable to pay all my just debts and funeral expenses.

SECOND.—In case my beloved wife, Elisa Wetzlar shall survive me then I give, devise and bequeath to her the sum of thirty-six thousand five hundred dollars, being the approximate equivalent of One hundred and fifty thousand Reichsmarks which she brought to me on our marriage, and I also give, devise and bequeath to my said wife in lieu of dower one equal third part of all the rest,

residue and remainder of my property and estate, 31
both real and personal of every kind, and wheresoever situate, to have and to hold to her, her heirs, executors, administrators and assigns forever.

THIRD.—In case my wife, Elisa Wetzlar, shall survive me, I give, devise and bequeath to her the said Elisa Wetzlar, in trust, one other equal third part of all the rest, residue and remainder of my property and estate, both real and personal, of every kind, and wheresoever situate to be had and holden by her, upon the following uses and trusts, namely: To collect and receive the rents, issues, income and profits of so much thereof as shall be 32
real estate, and to invest and keep invested so much thereof as shall be personal estate, with power to call in, and change the investments thereof from time to time and to collect and receive the income thereof and after paying thereout all lawful expenses and charges, to herself individually receive the whole of the net income from the said trust estate arising during the term of her natural life and so long as she shall remain unmarried, should she remarry before my said children are twenty-five years of age I direct her upon such marriage to convey, transfer, deliver and pay over to herself and to Alfred S. Heidelbach, of the City of New York, and James Speyer, of the City of New York, 33
or should they decline to serve in such capacity, to William B. Bonn and Emil Wetzlar of Frankfort-on-the-Main, as Trustees: to be thereafter held by the said Trustees during the remaining term of the natural life of the said Elisa Wetzlar upon trust to collect and receive the income and profits from the said trust estate arising and to pay over one-half of such net income to the said Elisa Wetzlar as and for her own property absolutely, and to pay over to her during the minority of both of my children the other half of the said net income to

34 be applied by her to the support, education and maintenance of my said two children during their minority and when the elder of my said two children becomes of age, I direct my said trustees to pay over to such child one-quarter of the net income of the said trust estate until said child shall become of the age of twenty-five years, and upon the happening of that event then to pay over to him one-quatrer of the principal of the said trust estate, the remaining quarter of the income of such trust estate to be paid to my said wife as aforesaid during the minority of my younger child, and to him upon his attaining his majority and until
35 he attains the age of twenty-five years and he my younger child to receive one-quarter of the principal of the said trust estate when he becomes twenty-five years of age. Should my said wife remarry after either of my children become twenty-five years of age, then I direct that one-half of the principal of the said trust estate be conveyed, transferred and delivered over by her in equal shares to my said children, or their issue, per stirpes, and not per capita.

Upon the death of my said wife, should such event happen during the minority of both of my said children, then I direct that the whole of the
36 principal of the said trust estate created by this paragraph of this my Will be delivered and paid over to the said Alfred S. Heidelbach, James Speyer of the City of New York, William B. Bonn and Emil Wetzlar of Frankfort-on-the-Main, to be held by them as Trustees during the minority of my said children. I direct my said Trustees to apply so much of the net income arising from the said trust estate as may in their judgment be necessary for the support, education and maintenance of my said two children until they respectively become twenty-one years of age, and as they respectively become of such age I direct that my said

Trustees convey, transfer, assign and set over to 37
them one-half of the principal of said trust estate with one-half of any accumulation thereon to such child so becoming of age.

Upon the death of my said wife after my children attain majority, I direct that the whole of the principal of the said trust estate then in their hands as trustees, be conveyed, transferred, assigned and delivered over by said trustees to my children or in case of their death to their issue in equal shares, per stirpes and not per capita.

FOURTH.—In case my wife, Elisa Wetzlar, shall survive me, I give, devise and bequeath to the said 38
Elisa Wetzlar, Alfred S. Heidelbach, James Speyer, William B. Bonn and Emil Wetzlar, trustees, the remaining equal one-third part of all the rest, residue and remainder of my property and estate both real and personal, of every kind and description, and whersoever situate, which shall belong to me or be subject to my disposal at the time of my death upon a separate trust to be had and holden by them and their successor and successors in the trust upon the following trust, namely, to collect and receive the rents, issues, income and profits or so much thereof as shall be real estate, and to invest and keep invested so much thereof 39
as shall be personal estate, with power to call in and change during the investment thereof from time to time and to collect and receive the income thereof and after paying thereout all lawful expenses and charges to pay the whole of the net income from the said trust estate arising to the said Eliza Wetzlar during the minority of both of her children.

When either of my said children become of age, then I direct my said trustees to pay over to such child then becoming of age the one-half part of such net income until he attains the age of twenty-five

years, upon the happening of which event I direct my said trustees to pay over to him one-half of the principal of the trust created by this paragraph of this my Will and the trust created by this paragraph of my Will shall cease when my youngest child becomes twenty-five years of age.

FIFTH.—If my wife survives me and both of my children, and both of my said children should die unmarried and without issue and without having received any part of the principal of my estate, then I direct that the trustees of all the trusts created by any of the preceding paragraphs of this my Will, pay over to her during the term of her natural life and during the time that she remains unmarried, the whole of the net income arising from any of the said trust estates except the sum of ten thousand Marks, which I direct them to pay to my mother during the term of her natural life. Should my wife surviving me and both of my children, they dying unmarried and without issue and without having received any part of the principal of my estate, remarry, then I direct that three equal fourth parts of the net income of said trust estates be paid to her after that event and the remaining fourth part thereof be paid to my mother if she be then living, and if she be then dead, to the children of my brothers and sister, in equal shares, per stirpes and not per capita. And in the event of the happening of the contingencies mentioned in the paragraph of my Will, I direct that upon the death of my wife, one-half of the principal of said trust estate be conveyed, transferred, delivered and paid over to such persons as she may by Will appoint to receive the same and the remaining one-half part thereof be conveyed, transferred and delivered by my said trustee to my mother, if living, and if she be not living then to

my brothers and sisters in equal shares, per stirpes 43
and not per capita.

SIXTH.—If prior to the receipt by either of my children of any portion of the principal of the trust estates created for their benefit by any of the paragraphs of this my Will, my wife should die, then I direct that after that event the whole of the income of the said trust estates or so much thereof as in their judgment may be necessary, be applied by my trustees to the support, education and maintenance of my said children until they respectively become of the age of twenty-one years and after they respectively become of the age of twenty-one 44
years and until they attain the age of twenty-five years, I desire that this whole of the income of the said trust estates be paid directly to them, and when they respectively become of the age of twenty-five years I direct that one-half of the principal of each of the trust funds hereby created and any accumulation thereof be conveyed, assigned, transferred and paid over in fee simple and absolutely to such child.

SEVENTH.—If either of my said children should die before reaching the age of twenty-one years, or before receiving the whole of the principal of any of 45
the trust estates created for his benefit by any of the provisions of this my Will and such child so dying should die unmarried and without issue, then I direct that the whole of the income which would have been applied for his benefit during his life and the whole of the principal of any trust fund which would have been paid over to him at the time of his attaining the age of twenty-five years or sooner, under any of the provisions of this my Will be held for the benefit of and paid over to my surviving child with the same force and effect as if such surviving child had been at the time of my

death my only child. If, however, such child so dying should die leaving lawful issue, then I direct that the principal of any trust estate created for the benefit of such child by any of the preceding provisions of this my Will be paid over at his death to such issue per stirpes and not per capita.

EIGHTH.—If my wife does not survive me, then I direct that the whole of the rest, residue and remainder of my estate after the payment of my debts be divided into two equal parts, and I give, devise and bequeath each of said parts upon a separate trust to Alfred S. Heidelbach and James Speyer of the City of New York, and William B. Bonn and Emil Wetzlar of Frankfort-on-the-Main, or their survivors, to have and to hold the said in trust upon the following uses and trusts, that is to say, to invest and keep invested the same, and collect and receive the rent, issues and profits thereof and after paying all just and necessary expenses thereout, to pay five thousand Marks from each of said estates to my mother, if living, during the term of her natural life, and to apply the whole or so much as they may deem best of the remainder of the net income arising from each of said trust estates to the support, education and maintenance of my said two children respectively until each child becomes of the age of twenty-one years, when I direct that the whole of the income arising from such trust estate be paid to such child until he arrives at the age of twenty-five years, and upon the happening of that event, I direct that the whole of the principal of the trust estate theretofore held in trust for him as heretofore directed, shall be paid over to him in fee simple and absolutely, except that I desire and direct that if my mother be living at the time of either of my children attaining the age of twenty-five years, then I direct my said trustees to withhold enough of the capital of the share

otherwise to be paid to such child attaining the age 49
of twenty-five years, to produce annually the sum of five thousand Marks, and during the term of the natural life of my mother, to pay to her annually such sum of five thousand Marks and upon her death, to pay, transfer and deliver over the whole of such capital thus reserved to the child from whose share of the principal of my estate such sum was reserved.

NINTH.—If during the continuance of any of the trust estates created by this my Will for my children, it shall be the judgment of the majority of my trustees evidenced by their consent in writing, 50
that any portion of the principal of the trust funds created for the benefit of either of my children should be paid over to him before he arrives at the age of twenty-five years, and after he attains his majority, then I direct my said trustees to pay over to him after he attains his majority, the whole of said portion of the principal of such trust fund in fee simple and absolutely as they may deem best. I express the wish, however, to each of my sons, that if after receiving his portion of any trust fund created for his benefit under this my Will, his mother be living, that he pay to her during her natural life interest thereon at such fair rate as 51
may be fixed by a majority of the persons whom I have named in my Will as trustees.

TENTH.—If at the time of my death my said wife and both my children be dead, then I give, devise and bequeath the whole of my estate, both real and personal, to my said trustees, upon the trust to invest and keep invested the same, and to collect and receive the income thereof, during the term of the natural life of my mother, to pay to her the sum of ten thousand Marks, and during the life of my mother I direct that the balance of the income of

the said trust estate be paid as follows, namely: three equal fourth parts thereof to my brothers' and sisters' children, and one-quarter thereof to my wife's nephews and nieces, with the exception of the children of Mrs. William B. Bonn, who are so independently situated that I fail to make them beneficiaries under this my Will.

At the death of my mother I direct my said trustees to deliver and pay over the principal of said trust estate in the same manner, namely, three equal fourth parts thereof to my wife's nephews and nieces with the exception of the children of Mrs. William B. Bonn.

ELEVENTH.—If at any time it should happen that there should be no surviving or acting trustees of any of the trusts created by any of the paragraphs of this my Will then I direct that the persons hereinafter mentioned as the guardians of my children, in case of the death of my wife, be and I hereby appoint them as such trustees.

TWELFTH.—I hereby authorize and fully empower the trustees of this my Will appointed by the several trusts by the preceding articles of this my Will created, or the survivor or survivors of them, to invest the whole or any portion of the principal of either or any of such trust estates in real or personal property in the United States or elsewhere, at their discretion and in such securities, bonds, stocks or other personal property as in their judgment will constitute judicious investment of the whole or any portion of such trust fund, not confining them or the survivors of them to such investments as trustees are by law only authorized to make, but having confidence in their good judgment and in their integrity. I do hereby authorize and empower them and the survivor of them to make whatever investment of such trust funds of any

sort or description they or the survivor of them may 55
deem advisable to make, and I do hereby will and direct that the said trustees and the survivor of them shall in no case be accountable or chargeable for any loss if any that may happen to such trust funds or to the funds of either of said trust estates by reason of such investments made by them or the survivor of them in good faith.

THIRTEENTH.—I appoint my wife, Elisa Wetzlar, and my friends, Alfred S. Heidelbach, J. D. Probst, of the City of New York, William B. Bonn and Emil Wetzlar, to be the Executrix and Executors of this my Will, and I direct that neither they nor any 56
of them, nor the trustees by this my Will appointed by any of the trusts created herein, shall in any case be required to give or file any bond as security upon their taking upon themselves any of the duties of their respective offices of trustees or executors.

FOURTEENTH.—I appoint my wife guardian of the persons of both of my children during their respective minorities. Should she die while either of my children have not yet attained the age of twenty-one years, then I appoint my mother, Charlotte Wetzlar of Frankfort-on-the-Main, Alfred S. 57
Heidelbach, William B. Bonn and Emil Wetzlar, guardians of the persons and estates of my said children, or should any of the above named persons refuse to become such guardians, then I appoint Phillip B. Bonn of Frankfort, guardian in his place.

FIFTEENTH.—I authorize and empower the trustee or trustees for the time being under any clause of this my Will in their, or her, or his discretion, to remove from the State of New York at any time any property which shall at the time being

form a part of any of the trust estates held by such trustee or trustees, and I likewise authorize and empower the guardian or guardians of the person and estate of each of my children during his minority in their, or her, or his discretion, to remove the personal estate of such child from the State of New York.

SIXTEENTH.—I hereby authorize and empower the executor of this my Will, or such of them as shall qualify and act as such, and the survivor and survivors of them, and I also hereby authorize and empower the trustees of this my Will, or the survivor or survivors of them, in their, or his, or her discretion to sell at public or private sale, or to lease in such terms and conditions as to them, or him, or her shall seem best, any and all real estate wheresoever situated, which shall belong to me at the time of my death, and to make, execute and deliver any and all deeds, leases and conveyances which shall be necessary or proper to carry out any sale or lease made by them, or him, or her into effect.

Whenever within my Will the words "Trustees," "Executors" or "Guardians" are used, it shall be understood that such phrase covers and includes the survivor, successor and successors of such trustees, executors or guardians.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the fourteenth day of February, in the year one thousand eight hundred and ninety-six.

GUSTAVE J. WETZLAR. [L. S.]

On this fourteenth day of February, one thousand eight hundred and ninety-six the above named testator, Gustave J. Wetzlar, in our presence signed, sealed, published and declared the forego-

ing instrument as and for his last Will and Testa- 61
ment, and requested us to become witnesses thereto; whereupon we at his request, in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

Treadwell Cleveland, 422 Madison Ave., N. Y. City.
Philip S. Dean, 159 Madison Ave., N. Y. City.

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I, GUSTAVE J. WETZLAR, of the City of New York, a naturalized citizen of the United States, do hereby make, publish and declare this to be a 62
Codicil to my last Will and Testament, dated February fourteenth, one thousand eight hundred and ninety-six.

FIRST.—I hereby declare that it is my will and intent and meaning of the fifth article of my said Will that the sum of ten thousand Marks, which in and by said article I direct my trustees to pay to my mother during the term of her natural life, in certain contingencies in said article specified, shall in such contingencies be so paid to my said mother annually, during the term of her natural life, that is to say, that in such contingencies the said trustees shall pay to her and that she shall 63
receive from them the said sum of ten thousand Marks in each during the term of her natural life.

SECOND.—My friend Alfred S. Heidelbach has left New York and is now residing in Paris and his future residence in New York is uncertain, and I therefore revoke the appointment of the said Alfred S. Heidelbach as executor of and trustee under my said Will and as guardian of my children, and I hereby appoint Abraham Wolff, an executor of said Will, and as trustee of the several trusts there-

64 by created, in place and stead of the said Alfred S. Heidelbach, and I direct that no bond or other security for the faithful performance of his duties and in case my wife shall die before either of my children has attained the age of twenty-one years and I appoint the said Abraham Wolff one of the guardians of the person and estate of each of my said children who shall be an infant at the time of the death of my said wife in the place and stead of said Alfred S. Heidelbach.

THIRD.—As modified by this Codicil I hereby ratify, confirm and republish my said Will, dated
65 February the fourteenth, one thousand eight hundred and ninety-six, and this Codicil together to be and constitute my last Will and Testament.

IN WITNESS WHEREOF, I have hereunto set my hand and seal, this twentieth day of April, one thousand eight hundred and ninety-eight.

GUSTAVE J. WETZLAR [L. S.]

On this twentieth day of April, in the year one thousand eight hundred and ninety-eight Gustave J. Wetzlar the above-named testator, in our presence subscribed and sealed the foregoing instrument, and declared the same to be a Codicil to his
66 last Will and Testament, which bears date the fourteenth day of February, eighteen hundred and ninety-six, and we thereupon at his request in his presence and in the presence of each other hereunto subscribed our names as attesting witnesses.

Charles C. Beaman, 11 East 44th St., N. Y. City.
H. P. Wertheim, 33 West 57th St., N. Y. City.

## Exhibit B.

67

WHEREAS, Gustave J. Wetzlar, late of the City, County and State of New York, departed this life on the eighth day of November, 1898, at Frankfort-on-the-Main, Germany, having first made and published his Last Will and Testament in writing, bearing date of February 14th, 1896, together with a Codicil thereto, dated April 20th, 1898; which said Will and Codicil were thereafter and on February 1st, 1899, duly admitted to probate as a Will of real and personal estate by the Surrogates' Court of the aforementioned County of New York, 68
and there recorded in Liber 610 of Wills, at page 269 and following, and

WHEREAS, wherein and whereby the "Fourth" paragraph of the said Will, the said Gustave J. Wetzlar did devise and bequeath to the trustees therein named and designated, the certain equal one-third part of all the certain rest, residue and remainder of his estate, in trust, as is in the said "Fourth" paragraph of his Will particularly prescribed and set forth, until either of his two children should attain the age of 25 years, at which time the said Trustees were directed to pay over 69
to such child one-half of the principal of the said trust fund; and did further provide that the said trust should cease when the Testator's youngest child should become twenty-five years of age; and

WHEREAS, Julius G. Wetzlar, one of the children of the aforementioned Testator, is still surviving and will attain the age of 25 years on the 23rd day of August, 1908, at which time he is entitled to receive the certain one-sixth part of the said Testator's residuary estate, as hereinbefore particularly recited;

70 NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that I, the aforementioned Julius G. Wetzlar, of the Borough of Manhattan, City, County and State of New York, and one of the children of the aforementioned Testator, Gustave J. Wetzlar, for and in consideration of the sum of One Dollar to me in hand well and truly paid at and before the sealing and delivery of these presents by Robert C. Banes, as Trustee, under the Last Will and Testament of Charles H. Banes, deceased, and the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred, released and set over, and by these presents do hereby
71 grant, bargain, sell, assign, transfer, release and set over unto the said Robert C. Banes as such Trustee aforesaid, his successors and assigns, a one-third part of all and every my estate, right, title and interest of any kind, form or description whatsoever, in and to the residuary estate of the aforementioned Gustave J. Wetzlar, deceased, to which I am now or may hereafter become entitled, under and by virtue of the "Fourth" paragraph of the aforementioned Last Will and Testament of the said Gustave J. Wetzlar, TO HAVE AND TO HOLD the same unto the said Robert C. Banes, as such Trustee aforesaid, his successors and assigns, to and for his and their own proper use and benefit
72 forever; provided, however, that if I, the said Julius G. Wetzlar, shall well and truly pay, or cause to be paid unto the said Robert C. Banes as such Trustee aforesaid, his successors or assigns, my certain note of even date herewith for the sum of Five thousand ($5,000) Dollars, together with the interest thereon, or any note or notes which shall be given in renewal thereof, then this assignment shall be null and void, and the estate hereby created shall cease and determine.

AND I DO HEREBY CONSTITUTE AND APPOINT the said Robert C. Banes, as such Trustee aforesaid,

my true and lawful attorney irrevocable, with full power of substitution of other attorneys under him, and give and grant to him, his successors and assigns, full power and authority in my name or in the name or my heirs, executors or administrators, to ask, demand, sue for, recover and receive the said estate, right, title, interest, legacies and gifts hereinbefore mentioned and particularly set forth; and to compound, acquit, release and discharge the same; I hereby ratifying and confirming all and whatever he or they shall lawfully do or cause to be done in or about the premises. 73

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 31st day of March, 1905. 74
In the presence of:

ROBT. SCHWARZ.

JULIUS G. WETZLAR. [SEAL.]

STATE OF NEW YORK,
County of New York, } ss.:

On this 31st day of March, One thousand nine hundred and five, before me personally came Julius G. Wetzlar, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

ROBT. SCHWARZ, 75
Notary Public 45,
[SEAL.] for N. Y. Co.

Recorded in the Office of the Surrogates' of the County of New York, in Liber 1 of Conveyances and Mortgages of Interests in Decedents' Estates, page 451, on the 25th day of April, A. D. 1905, at 12 o'clock, 30 min., P. M.

Witness my hand and seal of the Court.

JAMES A. DONNELLY,
[SEAL.] Clerk of the Surrogates' Court.

76

## Exhibit C.

NEW YORK CITY, N. Y., March 31st, 1905.

On March 31st, 1906, for value received, I promise to pay to the order of Robert C. Banes, as Trustee of Charles H. Banes, deceased, at No. 328 Chestnut Street, in the City of Philadelphia, State of Pennsylvania, the sum of Five Thousand ($5,000) Dollars, together with interest thereon at the rate of six per cent. per annum, payable semi-annually, having pledged herewith as collateral security certain of my estate, right, title and inter-
77 est in and to the Estate of Gustave J. Wetzlar, deceased, as by the certain Assignment bearing even date herewith will more fully and at large appear;

And upon the non-performance of this promise, or upon default in the payment of any interest as aforesaid for the space of fifteen days after the same shall become due and payable, I hereby authorize and empower the holder of this note, without demanding payment of the same, or of the debt due thereon, to sell the said note, either at public or private sale, and also to sell all of my estate, right, title and interest in and to the aforesaid es-
78 tate of Gustave J. Wetzlar, deceased, as is in the aforementioned assignment set forth with the right to become purchaser thereof at such sale, freed and discharged from any equity of redemption, and without advertising or giving any further notice to me of such sale than by mailing a written notice thereof addressed to me, at No. 15 East 48th Street, Borough of Manhattan, City of New York, and to apply the proceeds, or so much thereof as may be necessary to the payment of this note, and of all necessary, legal and other costs and expenses, including counsel fees and other charges connected with the collection hereof, and the sale and deliv-

ery of the said estate and interest; holding me re- 79
sponsible for any deficiency, which I hereby undertake and agree to pay, and accounting to me for the surplus, if any.

AND I DO HEREBY AUTHORIZE AND EMPOWER the holder of this note to make, execute and deliver such deeds or other instruments as may be necessary to vest a good and valid title of the aforementioned estate, right, title and interest in the purchaser thereof at such sale, and in his or their heirs and assigns forever.

JULIUS G. WETZLAR.

80

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## Exhibit D.

PHILADELPHIA, PA., February 11th, 1909.

Mr. JULIUS G. WETZLAR,
No. 15 East 48th Street,
Borough of Manhattan,
City of New York, N. Y.

NOTICE.

You will please take notice that by virtue of the authority to me given in a certain note for the sum 81
of five thousand dollars, with interest, dated March 31st, 1905, due March 31st, 1906, in favor of me, Robert C. Banes, trustee, signed by you, and by reason of the non-payment of said note and interest, I will expose to public sale by Barnes & Lofland, Auctioneers, in the Public Salesroom, Philadelphia Bourse, east side of Fifth Street, between Market and Chestnut Streets, Philadelphia, on Wednesday, February 24th, 1909, at twelve o'clock noon, the collateral pledged with said note, to wit:

"A one-third part of all and every your estate, right, title and interest of any kind, form or de-

82 scription whatsoever, in and to the residuary estate of Gustave J. Wetzlar, deceased, to which you are now or may hereafter become entitled under and by virtue of the 'Fourth' paragraph of the Last Will and Testament of the said Gustave J. Wetzlar."

ROBERT C. BANES,
Trustee under the Will of Charles H. Banes, deceased.
By THOMAS MCCONNELL, JR.,
Attorney.

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83 **Exhibit E.**

WHEREAS, heretofore, on the thirty-first day of March, A. D. 1905, one Julius G. Wetzlar did make and deliver unto Robert C. Banes, as Trustee of Charles H. Banes, deceased, his certain promissory note bearing date March 31st, 1905, and providing for the payment of the certain sum of Five Thousand Dollars on March 31st, 1906, together with interest thereon at the rate of six per cent. per annum, payable semi-annually, at No. 328 Chestnut Street, in the City of Philadelphia, and as security for the payment of the said note did also make,
84 execute and deliver unto the said Robert C. Banes, as Trustee under the Last Will and Testament of Charles H. Banes, deceased, an assignment of a certain part, to wit, a one-third part of all and every the estate, right, title and interest of any kind, form or description whatsoever, of him, the said Julius G. Wetzlar, in and to the residuary estate of one Gustave J. Wetzlar, deceased, to which the said Julius G. Wetzlar was then or thereafter might become entitled, under and by virtue of the "Fourth" paragraph of the aforementioned last Will and Testament of the said Gustave J. Wetzlar, deceased, as by said assignment bear-

ing date the thirty-first day of March, A. D. 1905, 85
will more fully and at large appear.

AND WHEREAS, in and by the said promissory note, it is provided *inter alia* as follows: "And upon the non-performance of the promise (to wit, the payment of said sum of Five Thousand Dollars on March 31st, 1906) or upon default of payment of any interest thereon for the space of fifteen days after the same shall become due and payable, I hereby authorize and empower the holder of this note, without demanding payment of the same, or of the debt due thereon, to sell the said note, either at public or private sale, and also to 86
sell all my estate, right, title and interest in and to the aforesaid estate of Gustave J. Wetzlar, deceased, as is in the aforementioned assignment set forth, with the right to become purchaser thereof at such sale, freed and discharged from any equity of redemption, and without advertising or giving any further notice to me of such sale than by mailing a written notice thereof, addressed to me, at No. 15 East 48th Street, Borough of Manhattan, City of New York."

AND WHEREAS, the said Julius G. Wetzlar did default in the said promise, to wit, in the payment 87
of said sum of Five Thousand Dollars, and in the payment of interest due thereon for more than fifteen days after same became due and payable, and after repeated requests and demands for the payment thereof, failed, neglected and refused to make payment thereof.

AND WHEREAS, the said Robert C. Banes, Trustee as aforesaid, being the holder of said note, after having given due notice thereof as provided in said note to the said Julius G. Wetzlar, by mailing the same at Philadelphia, on the eleventh day of Feb-

ruary, A. D., 1909, addressed to the said Julius G. Wetzlar, to the address named in said note as aforesaid, and after due and full notice thereof to his attorneys in said matter, duly authorized to represent him, and after full advertisement thereof, did, on the twenty-fourth day of February, A. D. 1909, cause the said collateral, to wit.—"a one-third part of all and every the estate, right, title and interest of any kind, form or description whatsoever, of him, the said Julius G. Wetzlar, in and to the residuary estate of one Gustave J. Wetzlar, deceased, to which the said Julius G. Wetzlar was then, or thereafter might become entitled, under and by virtue of the 'Fourth' paragraph of the aforementioned last Will and Testament of the said Gustave J. Wetzlar, deceased," to be sold at Public Sale by Barnes & Lofland, Auctioneers, freed and discharged from any equity of redemption, to Elmer G. Parsley, for the sum of Three thousand dollars, he being the highest bidder and that being the highest bid therefor,

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, That I, the aforesaid Robert C. Banes, Trustee under the last Will and Testament of Charles H. Banes, deceased, for and in consideration of the aforesaid sum of Three thousand dollars, to me in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do hereby grant, bargain, sell, assign, transfer and set over unto the aforementioned Elmer G. Parsley, his executors, administrators and assigns, "one-third part of all and every the estate, right, title and interest of any kind, form or description whatsoever, of the said Julius G. Wetzlar, in and to the residuary estate of the aforementioned Gustave J. Wetzlar, deceased, under and by virtue of the 'Fourth' paragraph of the aforementioned last

Will and Testament of the said Gustave J. Wetzlar, deceased," freed and discharged from any equity of redemption. 91

TO HAVE AND TO HOLD the same unto the said Elmer G. Parsley, his executors, administrators and assigns forever.

AND I, the said Robert C. Banes, Trustee as aforesaid, do hereby constitute and appoint the said Elmer G. Parsley my true and lawful attorney, irrevocable, with full power of substitution of other attorneys under him, and give and grant to him, his successors and assigns full power and authority in 92
my name, to ask, demand, sue for, recover and receive the said interest in said estate as hereinbefore particularly mentioned and set forth, and to compound, acquit, release and discharge the same, I hereby ratifying and confirming all and whatsoever he, or they, shall lawfully do or cause to be done in or about the premises.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 20th day of March, A. D. 1909.

ROBERT C. BANES, Trustee of
Charles H. Banes, deceased.

93

SEALED AND DELIVERED
in the presence of
JOHN E. MCCULLY,
HENRY T. FELTY.

On the 20th day of March, A. D. 1909, before me, the subscriber, a Notary Public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared the above-named Robert C. Banes, Trustee under the last Will and Testament of Charles H. Banes, deceased, to me known to be the individual described in and who

94 executed the foregoing instrument, and in due form of law acknowledged the foregoing to be his act and deed as such Trustee, to the end that it might be recorded as such.

WITNESS my hand and Notarial seal the day and year aforesaid.

JOHN E. MCCULLY,
Notary Public.
Commission expires January 20, 1911.

PROTHONOTARY'S CERTIFICATE.

Recorded in the Office of the Surrogates of the
95 County of New York in Liber 7 of Conveyances and Mortgages of Interests in Decedents' Estates, page 117, on the 6th day of May, A. D. 1909, at 10 o'clock, A. M.

Witness my hand and seal of the Court.

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

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## Exhibit F.

WHEREAS, heretofore, on the thirty-first day of
96 March, A. D., 1905, one Julius G. Wetzlar, did make and deliver unto Robert C. Banes, as Trustee of Charles H. Banes, deceased, his certain promissory note bearing date March 31st, 1905, and providing for the payment of the certain sum of Five thousand dollars on March 31st, 1906, together with interest thereon at the rate of six per cent. per annum, payable semi-annually, at No. 328 Chestnut street, in the City of Philadelphia, and as security for the payment of the said note did also make, execute and deliver unto the said Robert C. Banes, as Trustee under the last Will and Testament of Charles H. Banes, deceased, an assignment of a cer-

tain part, to wit.—a one-third part of all and every 97
the estate, right, title and interest of any kind, form or description whatsoever, of him, the said Julius G. Wetzlar, in and to the residuary estate of one Gustave J. Wetzlar, deceased, to which the said Julius G. Wetzlar was then or thereafter might become entitled, under and by virtue of the "Fourth" paragraph of the aforementioned last Will and Testament of the said Gustave J. Wetzlar, deceased, as by said assignment, bearing date the thirty-first day of March, A. D., 1905, will more fully and at large appear.

And whereas, in and by the said promissory note 98
it is provided *inter alia* as follows: And upon the non-performance of the promise (to wit.—the payment of said sum of Five thousand dollars on March 31st, 1906), or upon default of payment of any interest thereon for the space of fifteen days after the same shall become due and payable, "I hereby authorize and empower the holder of this note, without demanding payment of the same, or of the debt due thereon, to sell the said note, either at public or private sale, and also to sell all my estate, right, title and interest in and to the aforesaid estate of Gustave J. Wetzlar, deceased, as is in the aforementioned assignment set forth, with 99
the right to become purchaser thereof at such sale, freed and discharged from any equity of redemption, and without advertising or giving any further notice to me of such sale than by mailing a written notice thereof addressed to me at No. 15 East 48th street, Borough of Manhattan, City of New York."

And whereas, the said Julius G. Wetzlar did default in the said promise, to wit.—in the payment in said sum of Five thousand dollars and in the payment of interest due thereon for more than fifteen days after same became due and payable, and after

repeated requests and demands for the payment thereof, failed, neglected and refused to make payment thereof.

AND WHEREAS, the said Robert C. Banes, Trustee as aforesaid, being the holder of said note, after having given due notice thereof as provided in said note to the said Julius G. Wetzlar, by mailing the same at Philadelphia, on the eleventh day of February, A. D., 1909, addressed to the said Julius G. Wetzlar to the address named in said note as aforesaid, and after due and full notice thereof to his attorneys in said matter, duly authorized to represent him, and after full advertisement thereof, did, on the twenty-fourth day of February, A. D., 1909, cause the said collateral, to wit.—"a one-third part of all and every the estate, right, title and interest of any kind, form or description whatsoever, of him, the said Julius G. Wetzlar, in and to the residuary estate of one Gustave J. Wetzlar, deceased, to which the said Julius G. Wetzlar was then, or thereafter might become entitled, under and by virtue of the 'Fourth' paragraph of the aforementioned last Will and Testament of the said Gustave J. Wetzlar, deceased," to be sold at Public Sale by Barnes & Lofland, Auctioneers, freed and discharged from any equity of redemption, to Elmer G. Parsley, for the sum of Three thousand dollars, he being the highest bidder and that being the highest bid therefor.

AND the said Robert C. Banes, Trustee as aforesaid, in pursuance of said above-mentioned sale, did, on the 20th day of March, A. D., 1909, for and in consideration of the aforesaid sum of Three thousand dollars, grant, bargain, sell, assign, transfer and set over unto the said Elmer G. Parsley, his executors, administrators and assigns, the said "one-third part of all and every the estate, right,

title and interest of any kind, form or description 103
whatsoever, of him, the said Julius G. Wetzlar, in and to the residuary estate of one Gustave J. Wetzlar, deceased, to which the said Julius G. Wetzlar was then, or thereafter might become entitled, under and by virtue of the 'Fourth' paragraph of the aforementioned last Will and Testament of the said Gustave J. Wetzlar, deceased," freed and discharged from any equity of redemption.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, That I, the aforesaid Elmer G. Parsley, for and in consideration of the aforesaid sum of Three thousand dollars, to me in hand paid, the receipt 104
whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do hereby grant, bargain, sell, assign, transfer and set over unto the Robert C. Banes, his executors, administrators and assigns, "one-third part of all and every the estate, right, title and interest of any kind, form or description whatsoever, of the said Julius G. Wetzlar, in and to the residuary estate of the aforementioned Gustave J. Wetzlar, deceased, under and by virtue of the 'Fourth' paragraph of the aforementioned last Will and Testament of the said Gustave J. Wetzlar, deceased," freed and discharged from any 105
equity of redemption.

TO HAVE AND TO HOLD the same unto the said Robert C. Banes, his executors, administrators and assigns forever.

AND, I, the said Elmer G. Parsley, do hereby constitute and appoint the said Robert C. Banes my true and lawful attorney, irrevocable, with full power of substitution of other attorneys under him, and give and grant to him, his successors and assigns, full power and authority in my name, to ask,

demand, sue for, recover and receive the said interest in said estate as hereinbefore particularly mentioned and set forth, and to compound, acquit, release and discharge the same, I hereby ratifying and confirming all and whatsoever he, or they, shall lawfully do, or cause to be done in or about the premises.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 20th day of March, A. D. 1909.

SEALED AND DELIVERED
in the presence of
HENRY T. FELTY,
JOHN E. McCULLY.

ELMER G. PARSLEY [SEAL.]

ON THE 20th day of March, A. D. 1909, before me, the subscriber, a Notary Public, for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared the abovenamed Elmer G. Parsley, to me known to be the individual described in, and who executed the foregoing instrument, and in due form of law acknowledged the foregoing to be his act and deed to the end that it might be recorded as such.

WITNESS my hand and Notarial seal the day and year aforesaid.

[SEAL.] JOHN E. McCULLY,
Notary Public.

Commission Expires January 20, 1911.

(PROTHONOTARY'S CERTIFICATE.)

Recorded in the Office of the Surrogates of the County of New York in Liber 7, of Conveyances and Mortgages, of Interests in Decedents' Estates, page 112, on the 6th day of May, A. D. 1909, at 10 o'clock A. M.

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

## Exhibit G.

109

THIS INDENTURE made this 20th day of June, A. D. 1910, by and between Robert C. Banes, of Wallingford, Pennsylvania, hereinafter called Grantor, of the first part, and Charles A. Chase, of the City and County of Philadelphia, State of Pennsylvania, hereinafter called Grantee, of the second part, WITNESSETH that the said Grantor, for and in consideration of the sum of Seven thousand fifty-three and 16/100 ($7,053.16) dollars, to him, in hand paid by the Grantee, at and before the sealing and delivery hereof, the receipt whereof is hereby acknowledged, has granted, bargained, sold, assigned, transferred and set over and by these presents doth grant, bargain, sell, assign, transfer and set over unto the said Charles A. Chase, his heirs, executors, administrators and assigns, all the right, title and interest of him, the said Robert C. Banes, of, in and to the one-third of all and every the estate, right, title and interest of any kind, form or description, whatsoever, of Julius G. Wetzlar in and to the residuary estate of Gustave J. Wetzlar under and by virtue of the fourth paragraph of the last Will and Testament of the said Gustave J. Wetzlar, deceased, being the same interest, property, claim and demand which Elmer G. Parsley by Deed dated March 20th, 1909, and recorded in the Office of the Surrogate of the County of New York, in Liber 7 of Conveyances and Mortgages of Interests in Decedents' Estates, page 112, granted and conveyed unto the said Grantor.

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111

TO HAVE AND TO HOLD the same unto the said Grantee, his heirs, executors, administrators and assigns forever.

AND the said Robert C. Banes covenants and agrees to and with the said Charles A. Chase that

he has made no assignment or transfer of the above-mentioned interest in the said Estate and that there are no offsets or liens against the same created by him or on his behalf and that he has the full right to transfer and assign the same as hereinabove set forth and provided for.

And I, the said Robert C. Banes, acting under and by virtue of the power of substitution given to me in the aforesaid Deed and under and by virtue of all other powers and authorities in me vested, do hereby constitute and appoint the said Charles A. Chase my true and lawful attorney, irrevocable, with full power of substitution of other attorneys under him and give and grant to him, his successors and assigns, full power and authority in my name, to ask, demand, sue for, recover and receive the said interest in said estate as hereinbefore particularly mentioned and set forth, and to compound, acquit, release and discharge the same, I hereby ratifying and confirming all and whatsoever he, or they, shall lawfully do or cause to be done in or about the premises.

In witness whereof, I have hereunto set my hand and seal the day and year first above written.

Robert C. Banes [seal.]

Signed, sealed and delivered
in the presence of:

Austin L. West.

## Notice of Appearance.

115

UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES A. CHASE, a citizen of the State of Pennsylvania,

AGAINST

EMIL WETZLAR and WILLIAM P. BONN, alien subjects of the Emperor of Germany.

116

SIRS:

PLEASE TAKE NOTICE THAT I HEREBY APPEAR specially as Solicitor for the above-named Emil Wetzlar, for the sole purpose of raising in issue the jurisdiction of this Court in this case and for no other purpose.

Dated, New York, December 10th, 1910.

CHARLES D. O'CONNELL,
Solicitor appearing specially for
Defendant, Emil Wetzlar,
Office and Post Office Address,
No. 27 William Street,
Borough of Manhattan,
New York City.

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To

JOHN A. SHIELDS, ESQ.,
Clerk of U. S. Circuit Court,
Southern District of New York.

FREDERIC W. FROST, ESQ.,
Complainant's Solicitor,
60 Wall Street,
New York City.

118 **Plea.**

UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES A. CHASE, a citizen of the State of Pennsylvania,

AGAINST

EMIL WETZLAR and WILLIAM P. BONN, alien subjects of the Emperor of Germany.

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The above-named Emil Wetzlar specially appearing under protest for the purpose of this plea and for no other alleges on his information and belief, that this Court has no jurisdiction of this case for the reason:

FIRST.—That no portion of the property of the Estate of Gustave J. Wetzlar and no portion of the trust fund of said Estate referred to in the Bill herein, is now or has been for at least five years prior hereto, within the City, County or State of New York nor within the Southern District of New York nor within the United States, but is, and has
120 been in Germany in the possession and control of the said Emil Wetzlar there residing.

WHEREFORE, said Emil Wetzlar prays that this case be dismissed with costs and that he go hence without day.

CHARLES D. O'CONNELL.

Solicitor appearing specially for the defendant, Emil Wetzlar, for the purpose of this plea, and for no other.

Office and Post Office Address,
No. 27 William Street,
Borough of Manhattan,
New York City.

STATE OF NEW YORK, } ss.: 121
City and County of New York, }

CHARLES D. O'CONNELL, being duly sworn, says: That he is an attorney and counselor-at-law, and resides in the City, County and State of New York, and has his office at No. 27 William street, Borough of Manhattan, City, County and State of New York. That he appears herein specially as the Solicitor for the defendant Emil Wetzlar for the purpose of this plea and for no other. That he has read and knows the contents of the foregoing plea and that the same is not interposed for delay and is true, in point of fact, to his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. 122

Deponent further says that the sources of his information and the grounds of his belief as to all matters therein not stated upon his knowledge are as follows: Correspondence from the German attorney of this defendant residing in Frankfort-on-the-Main, Germany, documents and letters from the said attorney in deponent's possession, and statement made to deponent by Richard Schuster, a member of the firm of Speyer & Company, bankers, a step-son of the late William P. Bonn, improperly cited herein as William P. Brown, and who is personally familiar with the circumstances connected with the administration of the Estate of the said Gustave J. Wetzlar, deceased. 123

Deponent further says that the reason why this verification is not made by the defendant and is made by the deponent is that the said defendant is not now within the City and County of New York, where deponent has his office.

CHARLES D. O'CONNELL.

Subscribed and sworn to before me }
this 10th day of December, 1910. }

MARY Z. SHAPIRO,
Notary Public,
[SEAL.] Queens County.

Certf. filed N. Y. County.

124 UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES A. CHASE, a citizen of the State of Pennsylvania,

AGAINST

EMIL WETZLAR, and WILLIAM P. BONN, alien subjects of the Emperor of Germany.

125

CERTIFICATE OF COUNSEL.

I hereby certify that in my opinion the foregoing plea is well founded in point of law.

CHARLES D. O'CONNELL,
Solicitor appearing specially for the purpose of this plea and for no other.

126

## Notice of Argument.

127

UNITED STATES CIRCUIT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

CHARLES A. CHASE, a citizen of the State of Pennsylvania,
Complainant,

AGAINST

EMIL WETZLAR, and WILLIAM P. BONN, alien subjects of the Emperor of Germany,
Defendants.

128

Said Complainant, Charles A. Chase, now comes, by his attorney, Frederic W. Frost, and moves the Court to set this action down for argument upon the fourth Monday in February, 1911, upon the plea filed herein by the said defendant, Emil Wetzlar, on the ground that said plea does not furnish sufficient defense to the Bill of Complaint herein filed.

FREDERIC W. FROST,
Attorney for Complainant.

129

We have notice of the above motion.

CHARLES D. O'CONNELL,
Attorney for Defendant, Emil Wetzlar,
appearing specially.

Dated December 29th, 1910.

130

## Opinion.

U. S. CIRCUIT COURT,

S. DISTRICT OF NEW YORK.

CHARLES A. CHASE

v.

EMIL WETZLAR and another.

131

LACOMBE, *C. J.*

These papers were mislaid and were thus overlooked. Otherwise decision would have been rendered promptly after argument. The plea is sufficient in law, and if the facts therein averred are established, this Court would have no jurisdiction of the controversy.

April 4th, 1911.

132

## Order.

133

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES A. CHASE, a Citizen of the State of Pennsylvania,
Complainant,
AGAINST
EMIL WETZLAR and WILLIAM P. BONN, alien subjects of the Emperor of Germany,
Defendants.

134

The plea of the defendant Emil Wetzlar to the bill of the complainant, Charles A. Chase, in this action, came on to be heard for argument before this Court, and Paul M. Herzog, Esq., of counsel for the said defendant, appearing specially for said defendant, for the purpose of this plea and for no other, was heard in support of said plea, and Charles H. Burr, of counsel for the complainant, was heard in opposition thereto. On consideration whereof, it is the opinion of this Court that 135
the plea is sufficient in law, and if the facts therein averred are established, this Court would have no jurisdiction in the controversy. Whereupon it is now hereby

ORDERED and DECREED by this Court that the said plea is sufficient in law and in form and that the complainant be allowed to file his general replication thereto.

Ordered this 17th day of April, 1911.

E. HENRY LACOMBE,
*U. S. C. J.*

136 **General Replication.**

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CHARLES A. CHASE, a Citizen of the State of Pennsylvania,
Complainant,

AGAINST

EMIL WETZLAR and WILLIAM P. BONN, alien subjects of the Emperor of Germany,
137 Defendants.

This replicant, saving and reserving to himself all and all manner of advantage and exception which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the plea of the said defendants, for replication thereunto sayeth that he doth and will ever maintain and prove his said bill to be true, certain and sufficient in the law to be answered unto by said defendants, and that the plea of the said defendants is very uncertain, evasive and insufficient in the law to be replied unto by this replicant and that said plea is
138 untrue in fact so far as it contravenes the facts set forth in complainant's bill; without that, that any other matter or thing in the said plea contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed, or avoided, traversed, or denied, is true; all which matters and things this replicant is ready to aver, maintain, and prove as this honorable Court shall direct, and humbly as in and by his said bill he has already prayed.

FREDERIC W. FROST,
Solicitor for Complainant.

Filed April 17, 1911

Circuit Court of the United States, Southern District of New York.

In Equity. No. 6-208.

CHARLES A. CHASE, a Citizen of the State of Pennsylvania, Complainant,

vs.

EMIL WETZLAR and WILLIAM P. BONN, Executors of the Estate of Gustave J. Wetzlar, Deceased, Alien Subjects of the Emperor of Germany, Defendants.

Frederic W. Frost, for Complainant.
Charles H. Burr, of Counsel.
Charles D. O'Connell, for defendant Wetzlar.

HAZEL, *J.*:

This is a suit in equity to recover the possession of one-third of one-sixth of an estate which it is claimed the defendant holds as executor of the last will and testament of Gustave J. Wetzlar, deceased. The bill alleges that the complainant acquired the interest in the estate of the decedent by assignment; that the defendant as executor or trustee though an alien collected the assets of the estate and set aside one-sixth of the residuary estate of the decedent in accordance with his last will and testament. It is also alleged in the bill that the defendant invested said one-sixth of the residuary estate of the decedent in railroad bonds which he holds in the City of New York as executor and which are subject to the jurisdiction of the court. The defendant Emil Wetzlar (who alone has been served with process) has filed a plea in bar denying the jurisdiction of the court on the ground that he is a non-resident alien and that the property and assets against which complainant asserts a claim have long since—five years prior to the beginning of the suit—been removed from the United States and that there is no property, assets or trust fund of the estate of the decedent within the jurisdiction of this Court.

The sufficiency of the plea was questioned and Judge Lacombe, who heard the argument held that if the facts alleged in the plea were established this court would not have jurisdiction of the controversy. Afterwards the complainant filed a general replication and now without either side having taken any testimony as to the truth or falsity of the plea the issues come before me under Circuit Court Rule 109 solely and simply on the pleadings, the bill, plea and replication. On the authorities of Kennedy vs. Creswell (101 U. S. 641) and American Graphophone Co. vs. Leeds & Catlin Co., (140 Fed. Rep. 981) the complainant contends that the burden of proof is on the defendant to support his plea by affirmatively proving that no portion of the trust funds of the deceased is now within the jurisdiction of the court and further that there has been no such fund within the Southern District of New York for a period of at least five years prior to the time specified in the bill.

The defendant on the other hand contends that his plea is a negative plea which places the burden of proof on the complainant he having raised the issue by his general replication.

I think that the language of the plea fairly interpreted contains a mere denial of the allegation that railroad bonds have been bought and are held by the executor in this district. The plea does not aver any new facts in avoidance but sets up the single denial of the allegation upon which the jurisdiction of the court is based. In Kennedy vs. Creswell, supra, evidence was produced by the plaintiff to establish the allegations of the bill tending to show that the plea was false. No testimony was offered in that case by the defendant and the Supreme Court in the opinion stated that his mere denial could not be received as truth of its own proof where the fact was directly in issue and that the burden of proof was upon him. (See also Streets Fed. Equity Prac., Sect. 896). The difference of procedure in that case and in the case at bar is at once perceivable and in my opinion the case does not support complainant's contention that the burden rests upon the defendant where the plea simply denies a material allegation of the bill. Moreover careful reading of the Kennedy case convinces me that the plea there contained new matter in avoidance of the right of the plaintiff to maintain this suit which in effect made it an affirmative plea.

In American Graphophone Co. vs. Leeds & Catlin Co., supra, this court broadly stated that the burden of proof rested upon the defendant to sustain his plea by proof but in that case there was an affirmative allegation in the plea namely that one Jones was the owner of the patent sued upon and that the complainant had no formal title thereto. Testimony was taken on both sides and it was held that the evidence of the defendant was insufficient to sustain the plea. If in this case for example the defendant had filed an answer denying the jurisdiction of the court instead of a plea in bar the complainant on the trial would unquestionably have been required to give testimony to show either that the defendant was an inhabitant of the district or that property was held therein for and on his account as executor of the Wetzlar Estate. By filing his plea directed to a particular allegation in the bill which in fact is one in relation to which the complainant has the affirmative of the issue the burden of proof is not transferred.

The case of Vacuum Oil Co. vs. Eagle Oil Company of New York, decided by Judge Cross (154 Fed. Rep. 867, affd. 162 Fed. Rep. 171) is thought to clarify any seeming perplexity in the practice arising from the absence of any clear definition of the terms, affirmative or negative pleas. He says in his opinion:

"An affirmative plea is one that sets up some matters de hors the bill. A negative plea denies some material allegation in the bill. In the former case the burden of proof rests upon the defendant, in the latter upon the complainant."

Following this rule the complainant should have given evidence of the truth of the allegation to which the plea was directed and as he has not done so the plea must be allowed.

There were other questions argued by counsel which bear upon

the power of the court in any event to enforce any decree affecting the defendant or any trust property which came into his possession, but such questions need not be decided since the decision on the first contention in favor of the defendant determines that the plea must be taken as true; and the effect of such determination is to establish a complete defense. (Streets Fed. Eq. Pr. 904).

Without requiring the defendant to answer over to the bill it must be dismissed but with costs.

Dated, Nov. 16, 1911.

J. R. H.,
*U. S. J.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y. Filed Nov. 18, 1911. John A. Shields, Clerk.

Circuit Court of the United States, Southern District of New York.

In Equity. No. 6-208.

CHARLES A. CHASE, a Citizen of the State of Pennsylvania, Complainant,
against
EMIL WETZLAR and WILLIAM P. BONN, Executors of the Estate of Gustave J. Wetzlar, Deceased, Alien Subjects of the Emperor of Germany, Defendants.

The complainant having filed his bill against the above named defendants and the defendant Emil Wetzlar having duly filed his plea to the same, and the complainant having thereafter filed his general replication, and having noticed the issues raised thereby for hearing, and the same having duly come on to be heard and the Court having heard Paul M. Herzog, Esq., of counsel for the said defendant, Emil Wetzlar, appearing especially for the said defendant, for the purpose of the said plea and for no other, and Charles H. Burr, Esq., of counsel for the complainant, and due deliberation having been had thereon,

It is hereby ordered adjudged, and decreed that the defendant's plea be, and it hereby is, in all things allowed, and that the complainant's bill filed in this cause be, and the same hereby is dismissed.

And it is further ordered, adjudged and decreed that the defendant Emil Wetzlar recover of the complainant his costs, and that the complainant is hereby adjudged to pay all costs incurred by the said Emil Wetzlar in this cause, and for which let execution issue.

Ordered, this 7 day of December, 1911.

JOHN R. HAZEL, *U. S. J.*

Copy received this 4th day of Dec. 1911.

FREDERIC W. FROST,
*Of Counsel for Defendant.*

Judgment entered Dec. 27, 1911. 12.15 P. M.
JOHN A. SHIELDS, *Clerk.*

U. S. Circuit Court, Southern District N. Y. Filed Dec. 8, 1911, John A. Shields, Clerk.

Circuit Court of the United States, Southern District of New York.

CHARLES A. CHASE, a Citizen of the State of Pennsylvania, Complainant,
against
EMIL WETZLAR and WILLIAM P. BONN, Executors of the Estate of Gustave J. Wetzlar, Deceased, Alien Subjects of the Emperor of Germany, Defendants.

SIR: Please take notice that upon the Decree in the above entitled matter duly filed in the office of the Circuit Court of the United States, Southern District of New York, on the 8th day of December, 1911, a copy of which you received on the 20th day of December, 1911, and upon all the proceedings heretofore had herein, judgment was this day duly entered in favor of the above named Emil Wetzlar and against the above named Charles A. Chase, in the sum of Eighty-five and 55/100 dollars, ($85.55), costs as taxes.

Dated, New York, December 27, 1911.

CHARLES D. O'CONNELL,
*Attorney for Defendant Emil Wetzlar, Appearing Specially, etc.,* 27 *William Street, New York City.*

To Frederic W. Frost, Esq., Attorney for Complainant, No. 60 Wall Street, New York City.

Circuit Court of the United States, Southern District of New York.

In Equity. No. 6-208.

CHARLES A. CHASE, a Citizen of the State of Pennsylvania, Complainant,
versus
EMIL WETZLAR and WILLIAM P. BONN, Executors of the Estate of Gustave J. Wetzlar, etc., Defendants.

To the Honorable J. R. Hazel, District Judge of the Western District of New York, Sitting as Circuit Judge of the Southern District of New York:

Your petitioner, Charles A. Chase, the above named plaintiff conceiving himself aggrieved by the decree made and entered on the 8th day of December, 1911, in the above entitled cause, by which said decree the bill filed by your petitioner was dismissed after hearing on bill, plea and replication thereto on the sole ground that under the pleadings no jurisdiction of the Circuit Court of the United States existed, and the suit was dismissed for that reason alone, does hereby appeal from said order and decree to the Supreme Court of the United States, as authorized by Section 5 of the Act of Congress of the United States, approved March 3rd, 1891,

for the reasons specified in the assignments of error filed herewith, and your petitioner prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which the said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 10th day of February, 1912.

FREDRIC W. FROST,
*Attorney for Petitioner.*

The foregoing claim of appeal is allowed, Bond to be entered in the sum of $250.00 to be approved by the Clerk.

Dated February 10th, 1912.

JOHN R. HAZEL,
*U. S. Judge.*

Circuit Court of the United States, Southern District of New York.

In Equity. No. 6-208.

CHARLES A. CHASE, a Citizen of the State of Pennsylvania,
Complainant,
versus
EMIL WETZLAR and WILLIAM P. BONN, Executors of the Estate of Gustave J. Wetzlar, etc., Defendants.

*Assignments of Error.*

Your petitioner, Charles A. Chase, prays an appeal from the final decree of this Court to the Supreme Court of the United States, and assigns for error:

First. That the Court erred in sustaining the sufficiency of the plea to the bill in the above entitled cause.

Second. The Court erred in dismissing the bill after hearing upon bill, plea and replication.

Third. The Court erred in refusing to maintain jurisdiction of the above entitled cause.

Fourth. The Court erred in dismissing the bill in the above entitled cause for lack of jurisdiction.

FREDRIC W. FROST,
*Attorney for Petitioner.*

Circuit Court of the United States, Southern District of New York.

In Equity. No. 6-208.

CHARLES A. CHASE, a Citizen of the State of Pennsylvania,
Complainant,
versus
EMIL WETZLAR and WILLIAM P. BONN, Executors of the Estate of Gustave J. Wetzlar, etc., Defendants.

*Certificate Under Section Five of the Act of March 3rd,* 1891.

In this cause I hereby certify that this appeal is granted solely, and that the order of dismissal of the bill herein made is based solely on the ground that no jurisdiction of the Circuit Court of the United States exists; that this question has been determined by me after hearing upon bill, plea to the jurisdiction and replication, and is founded, as above stated, on the sole ground that no jurisdiction over the defendant exists.

I further certify that after the rendition of my opinion on November 16th, 1911, counsel for plaintiff wrate to me with respect to this certificate, as shown in Exhibit "A" attached hereto; and my reply to counsel was shown in Exhibit "B" attached hereto. That afterwards I signed at the request of counsel for the defendant a decree of dismissal, and returned the same to the Southern District of New York by mail, where it was filed on December 8th, 1911, and served on counsel for plaintiff on December 20th, 1911; that I sat as Circuit Judge in the Southern District of New York at the time of the hearing of this cause, and have not been within the Southern District of New York for the conduct of business since the entry of said decree of dismissal. That by the letter attached hereto as Exhibit "B" I intended to reserve to myself the right to make this certificate upon appeal, and to extend the term for that purpose. I therefore make this certificate and grant to the plaintiff an appeal to the Supreme Court of the United States this 10th day of February, 1912, nunc pro tunc as of December 21st, 1911.

This certificate is made conformably to act of Congress of March 3, 1891, chapter 517, and the opinion filed herein is made a part of the record, and will be certified and sent up as a part of the proceedings, together with this certificate.

JOHN R. HAZEL,
*U. S. Judge.*

EXHIBIT "A."

DECEMBER 7TH, 1911.

Hon. John R. Hazel, Justice U. S. Circuit Court, Buffalo, N. Y.

DEAR SIR: Referring to the case of Chase against Wetzlar, Executor, you will recall that some days ago you handed down an opinion holding that the jurisdiction of the U. S. Circuit Court had not

been established, the question being as to whether the plea was an affirmative or a negative plea and therefore whether the burden of proof to show jurisdiction was on the plaintiff or the defendant. You held that it was upon the plaintiff and that he failed to meet such burden of proof. I appear as solicitor in the case for Chas. H. Burr, Esq., of the Philadelphia Bar. He writes me that he desires to appeal the case directly to the Supreme Court of the United States and that a certificate of your honor is required in an appeal such as this respecting the jurisdiction of the Court. He asks me to learn when you will be in New York and when he can appear before you for this purpose. I would appreciate it much if you would advise me when you will be here so that an appearance can be had before you.

Thanking you in advance for your courtesy, I beg to remain,

Very truly yours,

(Sgd.) FREDRIC W. FROST.

EXHIBIT "B."

United States District Court, Western District of New York,
Chambers of the Judge.

BUFFALO, N. Y., —— —, ——.

MY DEAR MR. FROST: My present intention is to be in New York to complete unfinished cases the week beginning Jan'y 1st, 1912, when I'll be glad to have you come into Court to see me in re Wetzlar.

Yours,

(Sgd.) JOHN R. HAZEL.

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Feb. 27, 1912.

American Surety Company of New York.

37796.

Capital and Surplus $6,000,000.

District Court of the United States for the Southern District of New York, in the Second Circuit.

In Equity. No. 6-208.

CHARLES A. CHASE, a Citizen of the State of Pennsylvania,
Plaintiff,
against
EMIL WETZLAR and WILLIAM P. BONN, Executors of the Estate of Gustave J. Wetzlar, &c., Deceased, Defendants.

Know all men by these presents, That we, Charles A. Chase, as Principal and American Surety Company of New York, as Surety,

are held and firmly bound unto the above named Defendants, in the sum of Two hundred and fifty dollars ($250.00), to be paid to the said defendants, their executors administrators successors or assigns; for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 19th day of February, 1912.

Whereas, the above named Charles A. Chase has prosecuted an appeal to the Supreme Court of the United States to reverse the order and decree rendered in the above entitled suit, on the 8th day of December, 1911, by the Judge of the Circuit Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such That if the above named Charles A. Chase shall prosecute the said appeal to effect and answer all costs if he shall fail to make his plea good, *this* this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CHARLES A. CHASE.
AMERICAN SURETY COMPANY OF NEW YORK.
By HORACE P. HOLLISTER,
*Resident Vice-President.*

[L. S.]

Attest:

M. W. DIVINE,
*Resident Ass't Secretary.*

Sealed and delivered and taken and acknowledged this 19th day of February, 1912, before me.

——— ———.

The foregoing bond is approved this 29th day of February, A. D. 1912.

THOMAS ALEXANDER, *Clerk.*

STATE OF PENNSYLVANIA,
*City and County of Philadelphia, ss:*

On this 28th day of February, A. D., 1912, before me personally came Charles A. Chase, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

GEORGE KOPPENHOEFER, JR.,
*Notary Public.*

My Commission expires March 10, 1913.

STATE OF NEW YORK,
*County of New York, ss:*

On this 19th day of February, 1912, before me personally appeared Horace P. Hollister, Resident Vice-President of the American Surety Company of New York, to me known who being by me duly sworn,

did depose and say; that he resides in Mt. Vernon, N. Y., that he is the Resident Vice-President of the American Surety Company of New York; the corporation described in and which executed the above instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said Horace P. Hollister further said that he is acquainted with M. W. Divine and knows him to be one of the resident Assistant Secretaries of said corporation; that the *d*ignature of said M. W. Divine subscribed to the said instrument is in the genuine handwriting of the said M. W. Divine and was thereto subscribed by the like order of the said Board of Trustees, and in the presence of him the said Horace P. Hollister, Resident Vice-President.

E. A. FARRELL,
*Notary Public New York County.*

Certificate filed in all counties.

STATE OF NEW YORK,
*County of New York, ss:*

M. W. Divine being duly sworn, says: That he is a Resident Assistant Secretary of the American Surety Company of New York; that said company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said company and is duly qualified to act as surety under such laws. That said company has duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled, "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon;" that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $6,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

M. W. DIVINE.

Subscribed and sworn — before me this 19 day of Feb., 1912.

[L. S.]

E. A. FARRELL,
*Notary Public, New York County.*

American Surety Company of New York, Incorporated April 14 1884.

General Offices, 100 Broadway.

*Financial Statement, December 31st, 1911.*

Resources.

| | | |
|---|---|---|
| Real Estate, Home office building and land unencumbered | $3,000,000.00 | |
| N. Y. City Water Front, unencumbered | $166,047.91 | |
| | | $3,166,047.91 |
| Stocks and bonds, market value | | 3,814,536.00 |
| Cash in Banks and offices | | 867,775.25 |
| Premiums in course of collection | | 358,517.93 |
| Accrued Interest and Rents | | 60,312.91 |
| Guaranteed Mortgages | | 195,250.00 |
| | | $8,462,440.09 |

Liabilities.

| | |
|---|---|
| Capital Stock | $2,500,000.00 |
| Surplus | 3,706,986.53 |
| Reserve for Re-Insurance | 1,454,037.31 |
| Reserve for contingent claims | 728,865.54 |
| Reserve for contingent expenses | 30,000.00 |
| Bills and Accounts Payable, not due | 19,653.68 |
| Premiums paid in advance | 22,897.03 |
| | $8,462,440.09 |

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Mar. 2 1912.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Emil Wetzlar, Survivin Executor of the Estate of Gustave J. Wetzlar, Deceased, Defendan Greeting:

You are hereby cited and admonished to be and appear at a Su preme Court of the United States, at the City of Washington, withi Thirty days from the date of this Writ, pursuant to an Appeal dul allowed by the Circuit Court of the United States, for the Southern District of New York, and filed in the Clerk's Office of said Court o the 28th day of February, A. D., 1912, in a cause wherein Charles A Chase is Appellant, and you Appellee, to show cause, if any, why th decree rendered against the said Appellant as in the said Appea mentioned, should not be corrected, and why speedy justice shoul not be done to the parties in that behalf.

Witness the Honorable Learned Hand, District Judge for th

Southern District of New York, this 29th day of February, A. D. 1912.

LEARNED HAND,
*U. S. District Judge, S. D. of N. Y.*

Service of a copy of the within Citation is hereby admitted, this 2nd day of March, A. D. 1912.

CHARLES D. O'CONNELL.

[Endorsed:] Eq. 6/208. U. S. District Court, Southern District of New York. In Equity 6/208. Charles A. Chase, etc., Plaintiff, against Emil Wetzlar and William P. Bonn, executors, etc., Defendant. E. & A. D. 3353. Citation. Frederic Worthen Frost, Solicitor for Appellant, No. 60 Wall street, New York, N. Y. Due service of a copy of the within is hereby admitted. Dated —, 19—. ——. Filed Mar. 2, 1912. — M. U. S. District Court, S. D. of N. Y.

UNITED STATES OF AMERICA,
*Southern District of New York*, ss:

I, Thomas Alexander, Clerk of the District Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby Certify that the foregoing pages, numbered from one to sixty-five inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the cause entitled Charles A. Chase, a Citizen of the State of Pennsylvania, Complainant-Appellant, against Emil Wetzlar and William P. Bonn, Executors of the Estate of Gustave J. Wetzlar, deceased, alien subjects of the Emperor of Germany, Defendants-Appellees, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 20th day of March, in the year of our Lord One Thousand Nine Hundred and Twelve, and of the Independence of the said United States the One Hundred and Thirty-sixth.

[Seal District Court of the United States, Southern District of N. Y.]

THOS. ALEXANDER, *Clerk.*

[Endorsed:] United States Supreme Court. Charles A. Chase, a citizen of the State of Pennsylvania, Compl't-Appellant, vs. Emil Wetzlar and William P. Bonn, Executors of Gustave J. Wetzlar, deceased, alien subjects of the Emperor of Germany, Def's-Appellees. Transcript of Record. Appeal from the District Court of the United States for the Southern District of New York.

Endorsed on cover: File No. 23,121. S. New York C. C. U. S. Term No. 1045. Charles A. Chase, appellant, vs. Emil Wetzlar, surviving executor of the estate of Gustave J. Wetzlar, deceased. Filed March 25th, 1912. File No. 23,121.

No. 1045. OCTOBER TERM, 1911.

# Supreme Court of the United States.

Office Supreme Court, U. S.
FILED.
APR 4 1912
JAMES H. McKENNEY,
CLERK

CHARLES A. CHASE, Appellant,

*vs.*

EMIL WETZLAR, Surviving Executor of the Estate of Gustave J. Wetzlar, deceased, Appellee.

**APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.**

## MOTION TO ADVANCE AND BRIEF ON BEHALF OF APPELLANT.

FREDRIC W. FROST,
CHARLES H. BURR,
*Of Counsel for Appellant.*

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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# In the Supreme Court of the United States.

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*Charles A. Chase, Appellant,*

vs.

*Emil Wetzlar, Surviving Executor of the Estate of Gustave J. Wetzlar, Deceased, Appellee.*

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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AND NOW, this twenty-second day of April, 1912, comes the appellant, by his counsel, and moves the court to advance the above-entitled cause for hearing in the manner prescribed by Rule Six in accordance with Rule Thirty-two of this Court, because the only question in issue is the question of the jurisdiction of the Court below and this Appeal is taken under Section Five of the Act of March 3rd, 1891.

FREDRIC W. FROST,
CHARLES H. BURR,
*Counsel for Appellant.*

EASTERN DISTRICT OF PENNSYLVANIA, *ss:*

Raymond C. Karge, being duly sworn according to law, deposes and says; that on the twenty-ninth day of March, 1912, he deposited in the mail a Notice in the form attached hereto as Exhibit A and 5 copies of this Brief, addressed to Charles D. O'Connell, Esq., 27 William Street, New York City, N. Y., the proper address of the counsel for the Appellee, duly postpaid, and that by due course of mail the said letter would reach the counsel for Appellee on March thirtieth, 1912.

RAYMOND C. KARGE,

Sworn to and subscribed before me, this thirtieth day of March, A. D., 1912.

GEORGE KOPPENHOEFER, JR.,
*Notary Public.*

[SEAL]

My Commission Expires, March 10, 1913.

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EXHIBIT A.

MARCH 29th, 1912.

*Charles D. O'Connell, Esq., 27 William Street, New York City, N. Y.*

DEAR SIR:—Please take notice that on Monday, April 22nd, 1912, we will present to the Supreme Court of the United States, in the matter of Charles A. Chase *vs.* Emil Wetzlar, as surviving executor of Gustave J. Wetzlar, deceased, the motion, of which the enclosed is a copy. We also hand you herewith 5 copies of the brief which will be presented with the motion.

Yours respectfully,

FREDRIC W. FROST,
CHARLES H. BURR,
*Counsel for Appellant.*

## STATEMENT OF THE CASE.

This case is before the court on the sole question of the jurisdiction of the Circuit Court under Section 5 of the Act of March 3d, 1891. A bill in equity was filed by appellant against Emil Wetzlar, appellee, and William P. Bonn, as executors of the estate of Gustave J. Wetzlar, deceased. The bill showed that one Julius G. Wetzlar was entitled to receive one-sixth of the residuary estate of Gustave J. Wetzlar, deceased, on attaining twenty-five years of age, and that he had attained that age. The bill then showed that one-third of said one-sixth share of the residuary estate had been assigned absolutely to, and had become vested in Charles A. Chase, the complainant and appellant; that the defendants had refused to pay over the said one-third of one-sixth of the residuary estate of Gustave J. Wetzlar, deceased, to complainant. The prayer of the bill was for a decree establishing the right of complainant to receive such one-third of one-sixth interest in the said estate. The will of Gustave J. Wetzlar, deceased, was probated in the city of New York and letters granted thereon in that city to the executors.

Complainant is a citizen of the State of Pennsylvania, and defendants were alien subjects of the Emporer of Germany. Service of the bill was had under the Act of March 3d, 1875, Section 8, upon an order of extra-territorial service. (Record, page 9.) After the filing of the bill, but before service thereof, the defendant William P. Bonn died, and return to that effect was duly made. Service was made on the surviving executor, now sole executor, Emil Wetzlar, in accordance with the order for extra-territorial service. This defendant appeared specially, and filed a plea to the jurisdiction of the court, as follows:—

> "That no portion of the property of the estate of Gustave J. Wetzlar, and no portion of the trust fund of said estate, referred to in the bill herein, is now or has been for at least five years prior hereto, within the city, county or State of New York, nor within the Southern District of New York, nor within the

United States, but is, and has been in Germany in the possession and control of the said Emil Wetzlar there residing."

Complainant set the plea down for hearing on its sufficiency. The plea was sustained. Complainant thereupon filed a replication to the plea. No testimony was taken by either party, and the case came up for final hearing on bill, plea and replication. The Circuit Court held that the plea was sufficient, that the burden of disproving its averments was on complainant, and that inasmuch as there was no evidence introduced, the bill must be dismissed for want of jurisdiction. (Record, pages 47-9.)

An appeal was prayed for and allowed to this court upon the sole question of jurisdiction. A certificate to the effect that the appeal was allowed only on the question of jurisdiction was signed by the trial judge. This certificate (Record, page 52) discloses the following facts: The trial judge was the district judge for the Western District of New York, and was sitting on special assignment in the Southern District of New York. On November 16th, 1911, he rendered an opinion that the bill must be dismissed for lack of jurisdiction of the court. From the time of rendering that opinion until after the making of the certificate he was continuously without the Southern District of New York. After the rendering of the opinion, counsel for appellant wrote to him in Buffalo, stating that they wished to appeal, and asking when he would be in New York for the purpose of granting the certificate. He replied that he would be in New York for that purpose in January. Thereafter he signed outside of the district and transmitted to the Southern District of New York, by mail, the decree of dismissal. This was filed on December 8th, 1911. The term expired on December 31st, 1911. By this certificate the judge recites the above facts, and further declares that he intended by his letter to extend the term for the purpose of granting the jurisdictional certificate upon appeal. This certificate was therefore granted *nunc pro tunc* as of December 21st, 1911.

## SPECIFICATIONS OF ERROR.

CIRCUIT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK.

*Charles A. Chase, a citizen of the State of Pennsylvania, Complainant,*

versus

*Emil Wetzlar and William P. Bonn, Executors of the Estate of Gustave J. Wetzlar, &c., Defendants.*

IN EQUITY.

No. 6-208.

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## ASSIGNMENTS OF ERROR.

Your petitioner, Charles A. Chase, prays an appeal from the final decree of this court to the Supreme Court of the United States, and assigns for error:—

*First.*—That the court erred in sustaining the sufficiency of the plea to the bill in the above entitled cause.

*Second.*—The court erred in dismissing the bill after hearing upon bill, plea and replication.

*Third.*—The court erred in refusing to maintain jurisdiction of the above entitled cause.

*Fourth.*—The court erred in dismissing the bill in the above entitled cause for lack of jurisdiction.

FREDERIC W. FROST,
*Attorney for Petitioner.*

## ARGUMENT.

I. THE QUESTION OF JURISDICTION IS PROPERLY BEFORE THIS COURT.

(*a.*) The rule that a certificate as to jurisdiction must be signed within the term arises only because the trial judge is assumed to be within the district and to hold court during that term. The absence of the judge from the district for a continuous period beginning before the entry of the decree and lasting over the term, should, it is submitted, be interpreted as one of those extraordinary circumstances bringing this cause within the exceptions to the general rule, such as are recognized in Western Dredging and Improvement Company *vs.* Heldmaier, 116 Federal, 179 (1902), and Dalton *vs.* Gunnison, 165 Federal, 873 (1908).

In fact, a decree dismissing a bill, signed outside the district and sent through the mails to the Southern District of New York, for entry by the clerk, might indeed be held to be *void*. The court, however, has in its certificate recited that it intended to extend the term for the purpose of making the jurisdictional certificate; and its power to so extend the term would seem to be undoubted.

(*b.*) Fortunately, however, the question of jurisdiction in the case at bar is the only question that was or could have been raised in the court below under the pleadings. The case comes to this court on bill, plea to the jurisdiction, and replication. Consequently, under the authority of the settled cases no separate certificate is necessary. Shields *vs.* Coleman, 157 U. S., 168 (1895), and Excelsior Wooden Pipe Company *vs.* Pacific Bridge Company, 185 U. S., 282 (1902). A case precisely in point would seem to be Petri *vs.* Creelman Lumber Company, 199 U. S., 487 (1905). In that case objections were made to the certificate. Said this court:—

> "We are relieved, however, from the necessity of considering these objections, for the reason that the judgment of dismissal and the prior proceedings

clearly exhibit the ground upon which the judgment was based, and plainly make apparent on the record the fact that the only matter tried and decided in the Circuit Court were demurrers to pleas to the jurisdiction, and that the petition upon which the writ of error was allowed asked only for the review of the judgment, which decided that the court had no jurisdiction of the action. This being the state of the record, no bill of exceptions was required, and the question of jurisdiction alone was sufficiently certified to this court as required by the Act of March 3d, 1891."

To the same effect is the case of United States *vs.* Larkin, 208 U. S., 333 (1908).

II. THE COURT BELOW HAD JURISDICTION OF THE BILL.

(a.) *The plea to the jurisdiction was insufficient at law.*

The facts set forth in the bill show that letters testamentary were issued in the Surrogate's Court of the county of New York to Emil Wetzlar and William P. Bonn, and that these executors took upon themselves the duties of administering said estate, and collected and received the assets of the said estate, which they invested in railroad bonds within the city of New York. (Record, page 3.) The plea avers in addition that the surviving executor, Emil Wetzlar, five years ago took these assets away from New York and carried them to Germany where they now are. (Record, page 40.) For the purposes of the argument as to the sufficiency of the plea the above facts are admitted.

The position of complainant is that the Act of March 3d, 1875, Section eight, provides for the exact remedy sought to be secured in this case. That section is as follows:—

"When in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal prop-

erty within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service of publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner, as if such absent defendant has been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit under the jurisdiction of the court therein, within such district."

The bill was filed in accordance with the decisions in Payne *vs.* Hook, 7 Wall., 425 (1868), Byers *vs.* McAuley, 149 U. S., 608 (1893); Ingersoll *vs.* Coram, 211 U. S., 335 (1908), and Waterman *vs.* Bank, 215 U. S., 33 (1909), which hold that in a suit between citizens of different States, or in a suit to which an alien is a party, the right and title to a legacy may be determined in the Federal Court of the District where administration of the estate is had, and that the decree of the court operates to estab-

lish the right, which must be thereafter recognized and enforced in the appropriate surrogate proceedings in the State court. The form of the decree in these cases is peculiar. It is curiously like in its nature to the proceedings contemplated by the Act of March 3d, 1875; it is a proceeding to enforce a "legal or equitable lien upon * * * personal property within the district where such suit is brought." After such lien be established, then the complainant with his decree is entitled to go to the Surrogate's Court and claim thereunder. The refusal to recognize the decree would doubtless involve a federal question. This was the course of action sought to be pursued by complainant. He was met by the proposition that an executor by taking the personal assets out of the State avoids any liability to account therefor in a suit in equity. Complainant did not seek either (*a.*) a personal judgment against defendant, or (*b.*) a decree purporting to attach personal property within the district. He could not seek the former, because he could not secure personal service within the district; he could not ask the latter because of the peculiar nature of his suit, and because the personal property was in fact removed, accepting as true the averments of the plea. What he did ask was a decree establishing *"his title"* to property within the district. This narrows the question down to what is meant by property within the district; and it is submitted that for all purposes connected with the administration of an estate, at least that portion of the personal property which was received by the executor within the district is within the meaning of the law within that district.

It is not a question of fact to be determined in any case where it is sought to sue an executor, whether or not he has the personal assets of the estate physically within the State of his appointment. The practice is quite otherwise. The executor cannot even be sued where he is found outside of the State of his appointment. He must be sued in that State. This has been recognized as fundamental law for many years. Story, in his Conflict of Laws, Section 513, says:—

> "It has hence become a general doctrine of the common law, recognized both in England and America, that no suit can be brought or maintained by any executor or administrator, or against any executor or administrator, in his official capacity, in the courts of any other country except that from which he derives his authority to act in virtue of the probate and letters testamentary, or the letters of administration there granted to him."

This view is recognized throughout the United States, and is expressed by this court in several cases, including Vaughan *vs.* Northup, 15 Peters, 1 (1841). Therein an administrator appointed in Kentucky was sued in the District of Columbia. The bill was dismissed for want of jurisdiction, and this court affirmed, saying:—

> "Under these circumstances the question is broadly presented whether an administrator, appointed and deriving his authority from another State, is liable to be sued here, in his official character, for assets lawfully received by him under and in virtue of his original letters of administration. We are of opinion, both upon principle and authority, that he is not. Every grant of administration is strictly confined in its authority and operation to the limits of the territory of the government which grants it; and does not, *de jure*, extend to other countries. It cannot confer, as a matter of right, any authority to collect assets of the deceased in any other State; and whatever operation is allowed to it beyond the original territory of the grant it is a mere matter of comity, which every nation is at liberty to yield or to withhold, according to its own policy and pleasure, with reference to its own institutions and the interests of its own citizens. On the other hand, *the administrator is exclusively bound to account for all the assets which he receives under and in virtue of his administration to the proper tribunals of the govern-*

*ment from which he derives his authority;* and the tribunals of other States have no right to interfere with or to control the application of those assets, according to *lex loci.*"

The relations between the State courts and the several Federal courts with respect to questions of distribution of, and claims against, estates, are analyzed and determined by this court in a series of cases. On the one hand, it was determined in Payne *vs.* Hook, 7 Wall, 425 (1868), that, granted diversity of citizenship, the right existed to sue an administrator within the State where probate had been had, and that this jurisdiction was wholly independent of any State legislation. Byers *vs.* McAuley, *supra,* and Ingersoll *vs.* Coram, *supra,* are more recent examples of this principle, although these last two cases make it absolutely clear that the nature of the decree must be simply to establish a right to be recognized thereafter by the State court of probate. On the other hand, it was determined in Williams *vs.* Benedict, 8 How. 107 (1850), that a non-resident creditor obtaining a judgment against an administrator in the Federal Court was not entitled under that judgment to seize the assets of the estate in execution. Said the court:—

> "The jurisdiction of that court [the probate court] has attached to the assets; they are *in gremio legis.*"

This determines the law to be that the assets of a decedent's estate must be regarded in the eye of the law as in the possession of the court approaching the executor. His possession is the possession of the court, as the possession by a receiver is the possession of the court. He is the officer of the court and subject to its jurisdiction. It is not thinkable that this jurisdiction and this possession in the eye of the law by the court, can be defeated by the executor physically taking the assets beyond the territorial jurisdiction of the court.

This case has been followed by numerous others, among which is Yonley *vs.* Lavender, 21 Wall., 276 (1874).

It is therefore clear that only in New York can the defendant in the case at bar be called to account as executor. An action in equity in the State Supreme Court against him, similar to the action in equity in the court below, would be open to the same objections as this action. The only possible remedy, if defendant's contentions are to prevail, would be proceedings to enforce the filing of an account, but, in accordance with the Surrogate's practice in New York, a disputed question of distribution cannot be determined by the Surrogate. When such question arises, the Surrogate directs the holding of the fund until the suit be determined in an appropriate court of equitable jurisdiction.

Matter of Randall, 152 N. Y., 508 (1897);
Matter of Schnabel, 202 N. Y., 135 (1911).

What complainant, it is submitted, is entitled to have, is a decree establishing his title by the Circuit Court for that District wherein defendant as executor must account, and wherein in contemplation of law the assets necessarily are. Thus in Ingersoll *vs.* Coram, *supra*, the decree provided for the payment to the non-residents "so soon as the probate administration is finished and distribution is ordered by the Probate Court having jurisdiction." A similar decree is precisely what is desired in the case at bar, that complainant be declared entitled to a certain share in the estate of Gustave J. Wetzlar, deceased, payable when and as distributed through the medium of the State Surrogate Court. It is idle for defendant to argue that there is no personal property within the district which can be seized by this court and turned over in satisfaction of a decree. Complainant is not seeking to obtain such a decree. But when this court has decreed that he is entitled to share in this estate, complainant is then free to go into the Surrogate's Court and enforce an accounting and a recognition of this decree.

This action is not an action *in personam*. It is not an action strictly *in rem*. It is an action *quasi in rem* that is, an action, as it is defined in Freeman *vs.* Alderson, 119 U. S., 185 (1886), brought against persons, but which really seeks to determine a property right. It cannot affect the defendant personally to have the property right to an estate in the course of distribution within the district determined, and so far as any use that may be made of the decree proposed similar to the decree entered in Ingersoll *vs.* Coram, *supra*, is concerned, that decree could only be used in the future proceedings in the State Surrogate's Court where the property is in contemplation of law, and must eventually be brought, unless actual embezzlement be proposed on the part of the defendant. Putting the matter differently, the decree sought is only a determination of the rights of complainant against the estate of Gustave J. Wetzlar, deceased. This estate is in the eye of the law, within the County of New York, where any and all suits pertaining to the distribution of the estate, and to accounting therefor, must be brought. Respondent cannot, certainly, by setting up an absolutely illegal act, be heard to deny that within the contemplation of law the estate is for purposes of distribution within the County of New York.

The question is not one for a strict construction of the statute. It is a remedial statute, to be liberally construed. In Brown, Receiver *vs.* Pegram, 143 Federal, 701 (1906), the question of extra-territorial service against the defendants, subjects of Great Britain, arose.

The complainant therein had been appointed Receiver of a certain corporation, against which one defendant had secured a judgment in that district. The bill was filed to determine the right and extent to which that defendant was entitled to share in the fund coming into the hands of the Receiver, and applicable to the payment of the judgment.

The defendant moved to set aside the extra-territorial service, and to dismiss the bill. The court said:—

"It is true the Receiver is not attempting to enforce an equitable lien upon or a claim to property within this district, but he is attempting to obtain a decree which will prevent Thomas Pegram from enforcing a claim to property within this district, which he should not be permitted to receive, and we are not inclined to believe that Congress used the words 'incumbrance, or lien, or cloud upon the title to property within the district,' in such a technical and restricted sense as contended for by counsel for the rule.

"The case is clearly within the meaning of the Act of Congress, as it is a proceeding to adjust the equities existing between the Receiver and the parties for whom Thomas Pegram holds a larger part of this judgment, which is a lien upon the fund in the hands of the Receiver in the sense that it is an established claim entitled to participate in a distribution among creditors.

"Rule to dismiss is overruled."

Certainly, the determination of the questions of the enforcibility of a judgment which will be entitled to share in a receivership fund, is a question of the same nature as the question as to the rights of the complainant in this case to share in an estate.

The decree entered in this case in favor of the complainant was sustained by the Circuit Court of Appeals for the Third Circuit, Ibbs *vs.* Archer, 185 Fed., 37 (1911), although this question was not argued on appeal. This case is therefore undoubted authority for a liberal construction of the Act of Congress.

It may be well to examine the consequences of sustaining this plea. It is well settled law that no right of action exists against an executor or trustee outside of the jurisdiction granting probate. It therefore follows either (*a.*) that an executor may take all the estate and go to a foreign country, or even another State, with impunity, or

(*b.*) that he is subject to extra territorial service by action in the State Court. If it be admitted that respondent is subject to proceedings in the State Court and that extra territorial jurisdiction may be obtained by such proceedings, it necessarily follows under the provisions of the Constitution that, granting diversity of citizenship, equivalent proceedings would normally lie in the Federal Court. The only possible answer is to say that the statute covering this subject by Congress, even when given a liberal construction, fails to provide any relief. It is submitted that this is not the proper construction of the Act, and that the proceeding in this case is a proceeding to enforce an equitable lien upon personal property which is within the intendment of the law *in gremio legis* within this district, and therefore within the jurisdiction of the United States Circuit Court for the Southern District of New York.

II. THE COURT BELOW HAD JURISDICTION OF THE BILL.

(b.) *The plea to the jurisdiction was not established by any evidence, and the issue should therefore have been resolved in favor of complainant.*

No evidence was offered by either party under the issues raised by the plea to the jurisdiction, and the general replication thereto. The case was set down for hearing upon the pleadings over three months after the filing of the replication, under Rule 109 of the Circuit Court of the Southern District of New York, reading as follows:—

> "When no proceedings are taken by either party within thirty days after replication, for the examination of witnesses out of court, either party may set the cause down for hearing upon the pleadings."

The sole question at the hearing was and now on appeal is: On which party rested the burden of proof with respect to the facts alleged in the plea? The defendant argued, and the court sustained his contention, that the plea simply denied the jurisdictional averments of the bill, constituted therefore a negative plea, and that the burden of disproving its averments rested on the complainant. Complainant contended that on jurisdictional questions presented by a plea, the burden of proof rests upon the defendant to show by competent evidence the truth of his plea and that the jurisdictional averments in the bill, rightly pleaded, must be taken to be true, until so disproved. The authorities upon this question would seem to be conclusive in favor of the appellant. In Sheppard *vs.* Graves, 14 Howard, 504 (1852) this court enunciated the principles which have since the decision in that case uniformly controlled the practice with respect to the force and effect of jurisdictional averments by a plaintiff at common law or complainant in bill of equity. That case was one at law, and the plea to the jurisdiction was

filed denying the jurisdictional averment as to the citizenship of the plaintiff. The language used by the court in that case states the practice since prevailing in the clearest language:—

> "The true doctrine applicable to the question is this: that although in the courts of the United States it is necessary to set forth the grounds of their cognizance as courts of limited jurisdiction, yet wherever jurisdiction shall be averred in the pleadings, in conformity with the laws creating those courts, it must be taken *prima facie* as existing, and that it is incumbent on him who would impeach that jurisdiction for causes *dehors* the pleading, to allege and prove such causes; that the necessity for the allegation and the burden of sustaining it by proof, both rest upon the party taking the execption. Such, we think, would be the proper rule resulting from the intrinsic character of the exception, and such we consider the doctrine enunciated in the cases."

In DeSobry *vs.* Nicholson, 3 Wall., 420 (1865), this case was cited with approval as establishing the following proposition:—

> "Where a plea in abatement is relied upon, the burden of proof rests upon the defendant."

Again, in Wetmore *vs.* Rymer, 169 U. S., 115 (1898), this court examined into the finding of the lower court that $2000 was not substantially in controversy and reversed the judgment of the lower court dismissing the suit upon that ground. This court concluded its opinion in the following words:—

> "Applying the law as heretofore stated by this court, in the cases cited, that a suit cannot be properly dismissed by a Circuit Court as not substantially involving a controversy within its jurisdiction, unless the facts, when made to appear on the record, create a

> legal certainty of that conclusion, we conclude that, in the present case, the want of jurisdiction was not made clear." (At page 128.)

The above cases were actions at law.

Hunt *vs.* New York Cotton Exchange 205 U. S., 322 (1907), is in equity and can hardly be distinguished from the case at bar. Here also the defendant filed a plea denying the allegations of the bill with respect to jurisdictional requirements. Here also a replication to the plea was filed. This court examined the evidence offered by the defendant in support of his plea and held that it failed to establish the averment of the plea. As to the question of burden of proof, this court said:—

> "On the issue presented by the plea the burden of proof was upon the appellant [defendant below], and he was required to establish by a preponderance of the evidence that the amount involved was less than the jurisdictional amount."

Inasmuch as in the case at bar the defendant offered no evidence in support of his plea, the issue must be resolved against him.

In Hill *vs.* Walker, 167 Fed., 271 (1909), the Circuit Court of Appeals for the Eighth Circuit examined at length the question of the effect of jurisdictional averments by a plaintiff. That case was at law, and the answer filed in accordance with the Missouri code, operated according to Missouri practice to put in issue all jurisdictional averments. No competent evidence was introduced at the trial with respect to the citizenship of the plaintiff. On appeal, the cases in point are reviewed at considerable length, and a conclusion in favor of the plaintiff was reached, and the jurisdiction sustained. Judge Hook dissented on the ground that the suit being at common law, the Conformity Act applied and the case was governed by the State Code. Inasmuch as the case at bar is in equity and independent of the State procedure acts, it would seem to be unnecessary

to examine into the validity of the reasoning of this dissenting opinion. The doctrine that in equity the burden of proof rests on the defendant to establish the facts set forth in his plea is a general doctrine which received a particular application in Hunt *vs.* New York Cotton Exchange, *supra*. It would be a departure from the time honored practice in Federal Courts to hold that a plea that an executor has removed all the assets of an estate outside the jurisdiction must be negatived and proved by the complainant. This would indeed cast upon a complainant a burden of proving a negative which, under the existing circumstances, and under the rules of practice may well in justice rest upon the party making such a plea.

III. INASMUCH AS ISSUE HAS BEEN JOINED, THE DECREE TO BE ENTERED SHOULD BE A FINAL DECREE IN FAVOR OF THE COMPLAINANT.

This is the general principle recognized in all equity pleading, as well as in issues at law. Defendant is not entitled to two separate trials upon two separate issues when the first trial has been decided against him on the facts. Kennedy *vs.* Creswell, 101 U. S., 641 (1879), is singularly close to the case at bar. That case arose on a bill against an executor, setting forth that the personal assets, although insufficient to pay all the debts, were being used to pay creditors, while leaving the complainant unsatisfied. The plea was that the executor had sufficient assets to pay all claims. The defendant offered no testimony. The account of the executor offered in evidence by complainant showed insufficient assets. The Supreme Court held that, inasmuch as the executor had put complainant to an issue, and that issue had been adjudged in favor of complainant, complainant was entitled to final relief. The decree, therefore, was entered against the executor for the amount of the debt. Said the court.

> "If a defendant plead a false plea, and it be so found, what is next to be done? it to be merely overruled, and an order made that he answer further, as in cases of overruling a demurrer, or of overruling a plea for insufficiency? This is not the usual course. Having put the plaintiff to the trouble and delay of an issue, the defendant cannot, after it is found against him, claim the right to file an answer; although, if the complainant desires a discovery, which the plea sought to avoid, he may undoubtedly insist upon it. But that is the complainant's right, not the defendant's. Lord Hardwicke said: 'All pleas must suggest a fact; it must go to a hearing; and if the party does not prove that fact which is necessary to support the plea, the plaintiff is not to lose the benefit of his discovery, but the court may direct an examination on interrogatories in

order to supply that.' Brownsword *vs.* Edwards, 2 Ves., 243. This statement is adopted by Lord Redesdale, Mr. Beames, and all subsequent writers on equity pleading. Mitf. (4th ed.), 302; Beames, Pleas in Equity, 318; Story, Ed. P., Section 697. If the plea is found to be false, it would seem to be just and equitable that the case should stand as if the defendant had admitted the allegations of the plaintiff. Sir Thomas Plumer states the matter thus: 'Supposing a plea to be correct in form, but proved false, it seems to be conceived that the course at the hearing is to take up just as if there was no answer. That is not correct. Upon a plea found false the plaintiff is entitled to a decree; and if a discovery is wanted, the defendant is ordered to be examined upon interrogatories.' Wood *vs.* Strickland, 2 Ves. & Bea., 150. Chancellor Walworth, in a case before him, where the defendant produced no evidence to establish the truth of his plea, said: 'Where a plea in bar to the whole bill is put in, if the complainant takes issue thereon he admits the sufficiency of the plea, and leaves nothing in question but the truth thereof. If at the hearing the plea is found to be true, the bill must be dismissed. But if the plea is untrue, the complainant will be entitled to a decree against the defendant in the same manner as if the several matters charged in the bill had been confessed or admitted.'"

The principle that upon the determination of a plea to be bad, complainant is entitled to a final decree as though the bill had been confessed or admitted, is recognized in many cases which followed the decision in Kennedy *vs.* Creswell, *supra*. One of the early cases is the case of Lilienthal *vs.* Washburn, 8 Fed., 707 (1881). Another case is that of Earll *vs.* Metropolitan St. Ry. Co., 87 Fed., 528 (1898). Again, in Eagle Oil Co. *vs.* Vacuum Oil Co., 162 Fed., 671 (1908), the Circuit Court of Appeals for the Third Circuit follows Kennedy *vs.* Creswell, *supra*, and

upon the determination of a plea adverse to the defendant entered final judgment for the complainant. A petition for *certiorari* to this court was denied: 214 U. S., 514.

There are, however, one or two other decisions which must be considered. In Farley *vs.* Kittson, 120 U. S., 303 (1887), a plea had been filed to a bill in equity and a replication filed by the plaintiff. Mr. Justice Gray analyses at some length the pleas filed, and says that the court below and the defendant seemed to have thought that the office of a plea was to add certain facts and then bring up as though on demurrer the bill with the added facts averred in the plea. The conclusion was that:—

> "The result is, that the principal question considered by the court below and argued at the bar is not presented in a form to be decided upon the record before us; and that, for the reasons above stated, and as suggested in behalf of the plaintiff at the reargument, the plea was erroneously sustained, and must be overruled, and the defendants ordered, in accordance with the 34th equity rule, to answer the bill."

The effect and spirit of this decision was to hold that the plea was insufficient and consequently the order of the court was for a further answer in accordance with the thirty-fourth equity rule, which is applicable to the "overruling of any plea or demurrer." The language used the concluding paragraph of Mr. Justice Gray's opinion, namely, "as suggested in behalf of the plaintiff at the reargument the plea was erroneously sustained" is extremely significant. Complainant did not ask for the entry of a final decree. He simply urged the *insufficiency* of the plea. At all events, there is nothing in the opinion to show the slightest intention of modifying the practice laid down in Kennedy *vs.* Creswell, *supra*. The use of the word "overruled" in Equity Rule 34 shows that it applies only to the overruling of a plea for insufficiency in law, putting it in the same class as a demurrer. Rules 34-36 refer to a preliminary

adjudication respecting the legal validity of a plea, and do not in any way refer to eventual determination of the issue raised by it.

In Dalzell *vs.* Dueber Mfg. Co., 149 U. S., 315 (1893) in an opinion by Mr. Justice Gray, Farley *vs.* Kittson, and Equity Rule 34, are cited without discussion as applicable to a case where, after bill, plea and replication, none of the evidence introduced tended to prove the matters set up in the plea.

In Westervelt *vs.* Library Bureau, 118 Fed., 824 (1902), the Circuit Court of Appeals of the First Circuit reached a conclusion on the meaning of Rule 34 at variance with the Circuit Court of Appeals for the Third Circuit in Eagle Oil Co. *vs.* Vacuum Oil Company, *supra*. Apparently, the court reached this conclusion contrary to its own judgment but in deference to the judgment of the decree in Farley *vs.* Kittson, *supra*. The court point out that according to the ordinary equity practice, final judgment should have been entered after the determination of an issue joined on a plea adversely to the defendant. The court further point out that in the language of equity practice "overruling" a plea means setting it aside on a question of law, and that Bates in his Federal Equity Procedure (Vol. 1, page 360), states that the usual equity practice has not been altered by Rule 34, where defendant has staked his case on an issue and lost. The court then concludes:—

> "Although we fail to find anything in any opinion of the Supreme Court in explanation of its purpose, yet we are compelled to accept the action of that court in Farley *vs.* Kittson, and in Dalzell *vs.* Mfg. Co., as conclusively sustaining the order of the Circuit Court now appealed against."

It is submitted that the equity practice as established by an unbroken line of authorities is as was enunciated in Kennedy *vs.* Creswell, *supra;* that the reasoning of this court in that case, apart from authorities cited, amply

vindicates the position then taken, that there is absolutely nothing in the language of equity Rule 34, applicable to cases where a plea is determined adverse to defendant upon an issue of fact; and that the form taken by the decree of reversal in Farley *vs.* Kittson and Dalzell *vs.* Mfg. Co., *supra*, was in no way intended by this court to place such an interpretation upon equity rule 34 as to utterly change existing practice. Moreover, this court has refused a *certiorari* to review the action of the Circuit Court of Appeals for the Third Circuit in applying the principles enunciated in Kennedy *vs.* Creswell, and in giving to Equity Rule 34 its normal and apparent interpretation.

There is nothing in this case to move the discretion of any court in the defendant's favor, assuming that the question may, under certain circumstances, be one of discretion. The plea attempts to set up a set of facts in violation of the law. The defendant, it is said, has gone to Germany, and has carried out of the United States all the trust funds belonging to an estate of which the administration proceedings can be held only in the State of New York. He now relies on the fact that he is in Germany and has the assets there, to avoid the accounting asked for under the authority of Ingersoll *vs.* Coram, 211 U. S., 335, *supra*. If the technicality sought to be set up, although founded on illegal and wrongful acts, should have been, nevertheless, successful, nothing perhaps could be had in the way of relief from this court; but now that defendant has rendered himself open to a decree *pro confesso*, such as was by this court entered in Kennedy *vs.* Creswell, *supra*, there is certainly no ground for an appeal to the discretion of the court to allow a further and different issue to be raised by himself.

In conclusion, it is submitted that according to the authoritative rules of equitable practice, the defendant is before this court by his special appearance under a plea which

should be resolved against him, because (*a.*) it is insufficient in law; (*b.*) the burden of proof was upon him and he has failed to substantiate the plea by evidence; and that under Kennedy *vs.* Creswell, *supra,* a decree *pro confesso* should be entered.

And it is further submitted that from the broad point of view of equitable and legal principles, it cannot be the policy of the law to permit an executor to avoid answering in the Federal Court for the State of his appointment, by the simple expedient of physically removing outside the State the assets collected within the State under the authority given by letters testamentary issued by its courts.

FREDERIC W. FROST,
CHARLES H. BURR,
*Of Counsel for Appellant.*

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IN THE

# Supreme Court of the United States

CHARLES A. CHASE,
Appellant,

against

EMIL WETZLAR and WILLIAM P. BONN, Alien Subjects of the EMPEROR OF GERMANY,
Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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## ARGUMENT.

### POINT I.

**The appeal should be dismissed because the jurisdiction of the Court below was never in question within the meaning of the Act of March 3rd, 1891, under which this appeal is taken.**

The Trial Court did not hold that it had no jurisdiction of this cause, owing to its lack of author-

ity as a Federal Court of limited jurisdiction. No question was raised by defendant of the Court's authority to act as a judicial tribunal, provided complainant proved the necessary and requisite facts existed to give the Court power to act in the premises. If complainant had proved that the property in question was within the territorial jurisdictional limits of the Court, the Court would undoubtedly have proceeded to adjudicate the rights of the parties to the same; but the complainant failed and omitted to prove his case, and the Court, not because of its limitations as a Federal Court, but simply as an ordinary judicial tribunal, dismissed his Bill for lack of proof.

It is hard to see, therefore, where the jurisdiction of the Court, *as a Federal Court*, is in question, and it is settled that it is only where this question has been raised that an appeal will lie to this Court.

As this Court held, in the leading case of *Louisville Trust Co.* v. *Knott*, 191 U. S., 225:

> "The question of jurisdiction which the statute permits to be certified to this Court directly must be one involving the jurisdiction of the Circuit Court as a Federal Court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other" (page 233).

And in *Bache* v. *Hunt*, 193 U. S., 523, at p 525:

> "It will be perceived that the jurisdiction of the Circuit Court was only questioned in respect of its general authority as a judicial tribunal and not in respect of its power as a court of the United States. The established rules of practice as to bringing in par-

> ties to ancillary or *pro interesse suo* proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved. It is settled that the question of jurisdiction which the Act of March 3rd, 1891, provides may be certified to this Court directly, must be one involving the jurisdiction of the Circuit Court as a Federal Court. *Louisville Trust Co.* v. *Knott*, 191 U. S., 225; *Blythe* v. *Hinckley*, 173 U. S., 501. Tested by this rule our jurisdiction fails, and the appeal must be dismissed."

And in

> *U. S.* v. *Larkin*, 208 U. S., 333 (Headnote 3);
>
> "* * * where the plea to the jurisdiction is simply whether the particular Court has jurisdiction, by reason of the locality in which the goods were seized, the question involved is not the jurisdiction of the United States court as such, and the question cannot be certified to this Court under Section 5 of the Judiciary Act of 1891; but the case is appealable to the Circuit Court of Appeals."

and to same effect

> *Fore River Shipbuilding Co.* v. *Hagg*, 219 U. S., 175.

As well might a party argue that the jurisdiction of the Court was at issue where he failed to properly file his pleading, and was adjudged in default, or where the Court or a Jury found he had not proved his case.

It is respectfully submitted, therefore, that the only question decided by the Court below was a

question of practice, and the only adjudication was, that one of the parties to a cause had neglected to prove his case, and that his Bill should therefore be dismissed, but not because the Court could not grant him the relief he sought, had he proved the facts set forth in his Bill of Complaint; on the contrary, it assumed full jurisdiction and completely decided the matter before it by dismissing complainant's Bill upon his failure to prove the material and essential allegations set forth therein, under which he had invoked the Court's jurisdiction and brought the defendant into Court. That upon complainant's failure to prove his case, his Bill would have been dismissed whether the case had been brought in any other Court than the Circuit Court, and that the Trial Court would have made the same disposition of the cause sitting as any other Court other than the Circuit Court, requires no argument.

The appeal, therefore, is improperly before this Court and should be dismissed.

## POINT II.

**The appeal should be dismissed because even assuming that the jurisdiction of the Court within the Act of March 3rd, 1891, was in issue at one stage of the proceedings, it was finally disposed of by the decision of Judge Lacombe from which decision the complainant has never appealed.**

The sufficiency of the plea (which is the only question in any way involving the jurisdiction of the Circuit Court) is no longer open to question by this complainant.

After the filing of the plea, the complainant noticed the plea for argument, as to its sufficiency, which argument was duly heard before Judge LACOMBE, who rendered the Opinion set forth on page 44 of the Record, and thereafter and on April 17th, 1911, an Order was duly made by the Court whereby it was

> "ORDERED AND DECREED by this Court that the said plea is sufficient in law and in form and that the complainant be allowed to file his general replication thereto" (Record, p. 45).

No appeal was taken by complainant from this Order, so that when the proceeding was brought on for Hearing by complainant filing his general replication (Record, p. 46), this Order was unmodified, in full force and effect, and binding on the

Court, and it is submitted, therefore, that in so far as the parties to this action are concerned, the sufficiency of the plea, and, therefore, the whole question of jurisdiction is *res adjudicata* and no longer open to question.

And as the burden of proving or disproving the plea cannot possibly raise a question of law as to jurisdiction, there is no question of jurisdiction for this Court to decide.

## POINT III.

**Even if it be held that this case involves a question of jurisdiction within the Act of March 3rd, 1891, and that that question is open on this appeal, the appeal must none the less be dismissed, because such jurisdictional question is not the only question involved.**

A. AN INSPECTION OF APPELLANT'S BRIEF ALONE DISCLOSES ONE OTHER QUESTION.

Were it not for the fact that the Trial Court has seen fit to grant the certificate stating that the only question involved is a jurisdictional one, this point might be sufficiently proved by directing the Court's attention to subhead 'b' of Point II of the *appellant's* brief. Not a syllable of this subhead relates to the Court's jurisdiction. It relates entirely to a question of burden of proof and contains at the beginning of the second paragraph, page 16 of the appellant's brief, the following statement:

> "The sole question at the hearing was and now on appeal is: On which party rested the burden of proof with respect to the facts alleged in the plea."

This statement is perfectly true, the respondent heartily concurs in it, and it is conclusive against the appellant.

B. AN EXAMINATION OF THE RECORD DISCLOSES STILL OTHER QUESTIONS.

As a matter of fact no matter which way the question of jurisdiction be resolved, one or the other of several non-jurisdictional questions must still be decided.

1. If the plea be good, then it must be determined whether it is an affirmative or a negative plea, and therefore whether the burden of offering proof was upon the appellant or the respondent. For, if the burden was upon the respondent, the judgment should have been against him, notwithstanding that there would have been a lack of jurisdiction had he proved his case. This alone is sufficient to defeat this appeal, but

2. If the plea be bad, then the question of the burden of proof falls, but there remain other questions to which the Court's attention is respectfully directed. Upon the Hearing, the defendant raised the question of the power of the Court to act because the defendants are sued as individuals whereas the property sought to be affected is held by them as executors (Record, p. 49), and also the lack of power in the Court to grant the relief demanded in the bill, namely, the immediate possession of 1/3 of 1/6 of the estate in question. The

Court below declined to pass on these questions, however, holding that its decision on the question of the burden of proof rendered consideration of these further questions unnecessary (Record, p. 49). But the defendant has raised these questions, they have never been decided against him, and he cannot be deprived of the benefit of a decision upon them, and if the Court upon this appeal may go into the merits of them, it is respectfully referred to Point VI *post*.

C. It is self-evident that the certificate of the court below certifying that a question of jurisdiction alone is involved on this appeal, is not conclusive.

## POINT IV.

### The Circuit Court was without jurisdiction of the above-entitled cause.

A. The Court had control neither of the person of the defendant nor of the property sought to be affected.

It is to be noted that complainant concedes that a personal judgment cannot be rendered against the defendant. (Appellant's brief, pages 9 and 13.)

The jurisdiction of the Court over this cause being claimed solely by virtue of Section 738 of the Revised Statutes as re-enacted by Section 8 of Act of March 3rd, 1875, c. 137, 18 Stat., 572, U. S. Comp. Stat., 1901, p. 513, the essential portions of which are as follows:

"When in any suit, commenced in any Circuit Court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property *within the district where such suit is brought*, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the Court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons *in possession or charge of said property*, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the Court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer or demur within the time so limited, or within some further time, to be allowed by the Court, in its discretion, and upon proof of the service of publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the Court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner, as if such absent defendant has been served with process within the said district; *but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit under the jurisdiction of the Court therein, within such district*" (italics ours).

and no personal service having been effected, and the defendant not having appeared generally in the

action, it was absolutely essential that proof should have been made to the Court that the property, which was the subject of the suit, was under the jurisdiction of the Court, and located within the district, for under the very terms of the Act, the Court's

> "* * * Adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the Court therein, within such district." Sec. 738 (*supra*).

or as this Court held in *Freeman* v. *Alderson*, 119 U. S., 185;

> "The State has jurisdiction over property within its limits owned by non-residents, and may, therefore, subject it to the payment of demands against them of its own citizens. It is only in virtue of its jurisdiction over the property, as we said on a former occasion, that its tribunals can inquire into the non-resident's obligations to its own citizens; and the inquiry can then proceed only so far as may be necessary for the disposition of the property. If the non-resident possesses no property in the State, there is nothing upon which its tribunals can act. *Pennoyer* v. *Neff*, 95 U. S., 714, 723" (at p. 188).

And as said by the Court in *Cella Commission Co.* v. *Bohlinger*, 147 Fed. Rep., 419:

> "No State has any jurisdiction of persons or of property beyond its territorial limits (*Story's Conflict of Laws*, c. 2; *Wheaton's International Law*, pt. 2, c. 2) although it may often affect persons beyond its boundaries by virtue of its jurisdiction over their property within them and property without

> its limits by reason of its jurisdiction over the persons within them who own it" (at p. 421),

and at p. 422:

> "A State has jurisdiction of the property within its boundaries and to the extent necessary to justly apply that property it may by attachment thereof before hearing and by a substituted service of a summons upon its owner vest in its Courts the power to render a judgment against the owner by virtue of which the attached property and that property only may be seized and administered by its Courts. No property was attached in this case, however, and no jurisdiction was acquired by the Court below in this way,"

or as held in the New York Court of Appeals in the case of *Ward* v. *Boyce*, 152 N. Y., 191:

> "A party cannot be deprived of property without due process of law, and that term, in its application to judicial proceedings, means a course of legal proceedings according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. If the proceedings involve the determination of the personal liability of the defendant, he must be brought within the jurisdiction by service of process within the State, or voluntary appearance. If it be a proceeding in *rem*, the *res* must have been seized or attached, or at least must be within the jurisdiction." (At pp. 195-196.)

and someone had to prove to the satisfaction of the Court that these facts existed, for the Circuit Court could not presume it had jurisdiction over this case from the mere averments of the Bill.

for

> "* * * * the Circuit Courts of the United States possess no powers except such as the Constitution and the acts of Congress concur in conferring upon them, and the legal presumption is that every case is without their jurisdiction until the contrary affirmatively appears. No doubt can exist as to the correctness of this principle."
>
> *U. S.* v. *Southern Pac. R. R. Co., et al.*, 49 Fed., 297, at p. 300.

And while it may be true that before the Act of March 3rd, 1875, determining the jurisdiction of the Circuit Court of the United States was passed, the objection of the lack of jurisdiction of the Court was a very technical one, and could be raised only in a particular way and at a particular time, *Nashua Railroad* v. *Lowell Railroad*, 136 U. S., 356, where this Court said, at p. 373:

> "This rule is modified by the act of March 3rd, 1875, determining the jurisdiction of the Circuit Court of the United States. 18 Stat., 472. That statute provides that if in any suit commenced in one of such Courts 'it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this Act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the Court from which it was removed, as justice may re-

> quire, and shall make such order as to costs as shall be just.' "

or as the Court said in *Oregon R. & Navigation Co. v. Shell*, 143 Fed., 1004, at p. 1005:

> "The Act of Congress defining the jurisdiction of the United States Circuit Courts comprehends both law and equity cases, and makes the same limitation with respect to the amount involved applicable to both systems of jurisprudence, and the Courts are required to apply the same technical rules in equity cases that are applied in actions at law for the purpose of being assured of jurisdiction, and the appellate courts do not hesitate to reverse decrees and judgments when jurisdiction has been exercised by the Circuit Courts if the jurisdictional facts do not appear affirmatively in record. It is true, as shown by the brief of counsel for the complainant, that by collusion of parties causes were litigated in the Federal Courts which were not in fact cognizable therein, and such abuses led to an amendment of the law, whereby the Courts are required to dismiss or remand a case whenever satisfied that it does not really involve a controversy within its jurisdiction; *and it is my opinion that the Court must be so satisfied when a fact essential to the jurisdiction, averred in the pleading of the party invoking the jurisdiction, is controverted by the pleading of the opposite party, and the affirmative averment is not supported by evidence. This must be so, because it is illogical to cast the burden of proof upon the party having the negative side of a material issue.*
>
> The case of *Anderson v. Watts*, 138 U. S., 694, 701, 11 Sup. Ct., 449, 450, 32 L. Ed., 1078, relied upon by complainant's counsel in their argument, does not appear to me to support their contention that the burden of

proof rests upon the defendants to disprove the averments of the bill with respect to jurisdictional facts, nor to deny the duty of the Court to dismiss a case for want of jurisdiction which has been submitted without proof to sustain essential averments traversed by an answer. In its opinion in that case, the Court said: 'Although the averment as to citizenship may be sufficient, yet, if it appear that the averment is untrue, it is the duty of the Circuit Court to dismiss the suit; and this Court, on appeal or writ of error, must see to it that jurisdiction of the Circuit Court has in no respects been imposed upon.'

If an inference might be drawn from the quoted sentence detached from the body of the opinion that the duty of the Court to dismiss would arise only when it shall be made to appear affirmatively that an averment of a jurisdictional fact is untrue, nevertheless any such inference is unwarranted after due consideration of the opinion in its entirety. That case was a suit in equity, and the Court held that since the Act of 1875 the defendant in an equity case is not restricted by the rules of equity practice to a demurrer or plea as the only means available to test the jurisdiction of a Circuit Court, but may make objection to the exercise of jurisdiction in the answer; and the opinion reiterates what has been frequently declared by the Supreme Court.

'The jurisdiction of the Circuit Court is limited, in the sense that it has none except that conferred by the Constitution and laws of the United States, and the presumption is that the case is without its jurisdiction unless the contrary affirmatively appears.'

*It is my opinion that this presumption of a lack of jurisdiction must be controlling when the pleadings make an issue as to any fact essential to jurisdiction, and there is no*

> *evidence to sustain the affirmative allegation of such fact.*" (Italics ours.)

and in *Klenk v. Byrne*, 143 Fed. Rep., 1008, at p. 1009,

> "Formerly, in the practice of the federal courts, jurisdiction of a case commenced originally in a Circuit Court of the United States attached if the bill of complaint contained sufficient averments of the jurisdictional facts, and to oust the court of jurisdiction the defendant was required to contest the jurisdiction by a special plea; *but under the statutes now governing the practice the federal courts are required on their own motion to disclaim jurisdiction at any stage of a case, if satisfied that any essential fact does not exist.* Therefore, whenever the record shows upon its face that there is a controversy as to a jurisdictional fact, the court must require proof to support a finding to eliminate such question, *or else assume that it does not have jurisdiction.*" (Italics ours.) (At p. 1009; citing cases.)

That the Court below was so "satisfied" and did "require proof" is shown by its Opinion (Record, page 48):

> "If in this case, for example, the defendant had filed an answer denying the jurisdiction of the Court, instead of a plea in bar, the complainant on the trial would unquestionably have been required to give testimony to show, either that the defendant was an inhabitant of the district, or that property was held therein for and on his account as executor of the Wetzlar Estate."

and no proof having been furnished it, it properly "assumed" it had no jurisdiction.

for

> "By filing his plea, directed to a particular allegation in the bill which in fact is one in relation to which the complainant has the affirmative of the issue, the burden of proof is not transferred" (Record, p. 48).

This, of course, in no way conflicts with the cases of *Wetmore* v. *Rymer*, 169 U. S., 115; *Hunt* v. *N. Y. Cotton Ex.*, 205 U. S., 322, cited by appellant in his brief at pp. 17 and 18, and that line of cases.

In those cases there is no dispute as to the Court's jurisdiction over the parties to the cause, or over the subject matter thereof; the question being simply whether the requisite sum or value is in controversy, and the Courts have properly held that the absence of that ground of jurisdiction must be shown to a legal certainty; and necessarily so, for the claim of the complainant in those cases as set forth in his Complaint, is in itself one of the elements of the controversy and performs an evidential office, and when it is disputed by the defendant it merely furnishes proof of the existence of a controversy over the sum demanded, over the amount thereof, and not over the subject matter itself.

Furthermore, many of those cases involve property or property rights of no fixed measure or value, resting largely on estimate or opinion, and therefore difficult of accurate ascertainment, or the measure of value itself is in dispute.

In other words, in all those cases all the elements of a controversy exist which the Court, having jurisdiction of the parties and of the subject matter will proceed to adjudicate upon the merits.

It is respectfully submitted, however, that these

considerations cannot and do not apply to a case where the jurisdiction of the Court over the subject matter itself, and to each and every part thereof is in issue, where the Court has not acquired jurisdiction over the person of the defendant, and where the authority of the Court to proceed has been questioned *ab initio*.

B. THIS PROCEEDING BEING IN THE NATURE OF A PROCEEDING *in rem*, THE SITUS OF THE PROPERTY IS WHERE IT IS ACTUALLY LOCATED.

That this is a proceeding in *rem*, or if not strictly in *rem*, at least *quasi in rem* is conceded by complainant. (Appellant's brief, page 13.)

This Court, in case of *Freeman* v. *Alderson*, 119 U. S., 185, in referring to such actions, stated:

> "There is, however, a large class of cases which are not strictly actions in *rem*, but frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. Such are actions in which property of non-residents is attached and held for the discharge of debts due by them to citizens of the State, and actions for the enforcement of mortgages, and other liens. Indeed, all proceedings having for their sole object the sale or other disposition of the property of the defendant to satisfy the demands of the plaintiff, are in a general way thus designated" (at p. 187).

The property, however, must be "attached"; *Williams* v. *Benedict*, 8 How., 107, cited by appellant as the sole authority for the proposition:

> "This determines the law to be that the assets of a decedent's estate must be regarded in the eye of the law as in the possession of the court approaching the executor. His possession in the possession of the court, as the possession by a receiver is the possession of the court" (appellant's brief, p. 11).

is, to say the least, far from any such general authority.

That case, it is respectfully submitted, merely holds that under a peculiar statute of Mississippi relative to insolvent estates, one creditor cannot seize the whole in satisfaction of its debts. The quotation by complainant on page 11 of his brief being predicated on a statement immediately preceding it to the effect that the estate being insolvent, the probate court had ordered it "to be sold for the purpose of an equal distribution among all the creditors." The Court's opinion begins as follows:

> "The only question raised in this case depends on the construction of the peculiar statutes of Mississippi. It is, whether a plaintiff who has obtained judgment against the administrator of an intestate's estate, before it has been declared insolvent, has such a prior lien on the same as will entitle him to issue an execution and satisfy his judgment out of the assets, *after the estate has been declared insolvent by the Orphans' or Probate Court, and Commissioners appointed for the purpose of distributing the assets equally among all the creditors.*" (Italics ours.)

And the statement in appellant's brief, at page 12,

> "This case has been followed by numerous others, among which is *Yonley* v. *Lavender*, 21 Wall., 276 (1874),"

is hardly a correct one, for the *Yonley* case, the only one cited, is expressly based on the Statutes of Arkansas in reference to its Probate Courts, this Court saying:

> "The administration laws of Arkansas are not merely rules of practice for the Courts, but laws limiting the rights of parties, and will be observed by the Federal Courts in the enforcement of individual rights. These laws, on the death of DuBose and the appointment of his administrator, withdrew the estate from the operation of the execution laws of the State and placed it in the hands of a trustee for the benefit of creditors and distributees. It was thereafter in contemplation of law in the custody of the Probate Court, of which the administrator was an officer, and during the progress of administration was not subject to seizure and sale by anyone. * * * How can he account for the assets of the estate to the Court from which he derived his authority if another Court can interfere and take them out of his hands?" (at page 280).

The case at bar being a general one, however, and not based on any peculiar or local statute, and the property in dispute not being in the physical possession of any officer of the Court, or for that matter, of any person over whom the Court had personal jurisdiction, the Court was bound to apply the ordinary and general rule of law, namely: that the situs of personal property for the purpose of a proceeding in *rem* is in the State or country where it is actually located.

*Parmele's Wharton on Conflict of Laws*
(3rd Edit.), Vol. 1, Sec. 368 B.

C. APPELLANT'S CONTENTION THAT THE SURROGATE'S COURT OF NEW YORK COUNTY IS WITHOUT JURISDICTION TO DETERMINE "A DISPUTED QUESTION OF DISTRIBUTION" IS UNFOUNDED.

Defendant, as executor, will in due course and at the proper time account for his stewardship in the proper tribunal. Delay in such accounting has been largely due to the pendency of proceedings brought by this defendant's *cestui que trust* to set aside as void and fraudulent various transactions, among them the one out of which the alleged assignment which is the basis of this complainant's cause of action arose. It is instructive to note in this connection that following a decision of the Appellate Division of the State of New York, *Wetzlar* v. *Wood*, 143, New York Appellate Division Reports, page 313, the assignment in suit here, has upon the new trial therein ordered been declared void for usury. It is the intention of this defendant to account as soon as the appeal, taken by the defendants in that action, has been decided; for until a final decision has been rendered the questions arising upon an accounting would probably, as a matter of comity, be left undetermined by the Surrogate.

This does not mean that the statement on page 12 of Appellant's brief:

> "The only possible remedy, if defendant's contentions are to prevail, would be proceedings to enforce the filing of an account, but, in accordance with the Surrogate's practice

> in New York, a disputed question of distribution cannot be determined by the Surrogate. When such question arises, the Surrogate directs the holding of the fund until the suit be determined in an appropriate court of equitable jurisdiction. (*Matter of Randall*, 152 N. Y., 508; *Matter of Schnabel*, 202 N. Y., 135),"

is a correct exposition of the present New York law, for by Section 2472a of the New York Code of Civil Procedure, added by Chapter 576, Laws of 1910, and which went into effect September 1st, 1910,

> "The Surrogate's Court has also jurisdiction upon a judicial accounting or a proceeding for the payment of a legacy to ascertain the title to any legacy or distributive share, to set off a debt against the same and for that purpose ascertain whether the debt exists, to affect the accounting party with a constructive trust, and to exercise all other power, legal or equitable, necessary to the complete disposition of the matter. He must order the trial of any controverted question of fact of which either party has constitutional right of trial by jury and seasonably demands the same."

This has been construed by the Surrogate's Court of New York County in *Matter of Thornburgh*, 72 Miscellaneous Reports (N. Y.), page 619, the Court holding:

> "Under the language of section 2472a, Code Civil Procedure, added by chapter 576, Laws of 1910, it would appear that the Surrogate has jurisdiction upon a judicial accounting to ascertain the title to any legacy or distributive share, and to exercise all other power, legal or equitable, necessary to the complete disposition of the matter.

> It may be conceded for the moment, without extended inquiry, that, prior to the year 1910 and the act mentioned, the Surrogate had no jurisdiction to try the validity of assignments of the interests of legatees on the judicial settlement of the accounts of an executor" (at page 620).

The Court citing many cases, including *Matter of Randall* cited by appellant.

*Matter of Schnabel* (*supra*), the only other authority cited by appellant in support of his version of the law is clearly not in point.

To begin with the proceedings there were commenced before Section 2472a of the New York Code of Civil Procedure (*supra*) went into effect, and furthermore, and what is more pertinent to the question, the question in that case was not as to the validity of any legacy or the authority of the Surrogate "to set off a debt against the same and for that purpose ascertain whether the debt exists" (Sec. 2472a *supra*), but was merely a contest between the accounting party and a contending creditor respecting property alleged by the creditor to belong to the estate, and by the administratrix to be her personal property.

## POINT V.

### The bill was properly dismissed.

A. THE PLEA BEING A NEGATIVE ONE, THE BURDEN OF PROOF AS TO THE ISSUE RAISED BY THE REPLICATION WAS UPON THE COMPLAINANT.

It is to be noted here that nowhere in appellant's brief is the contention raised that defendant's plea

is an affirmative one. No answer is made to the opinion of the Court below that the plea is a negative one, and the burden of proof was therefore upon the complainant. Instead the point is first raised that the Court should have presumed that it had jurisdiction from the mere averments of jurisdictional facts in the Bill, although these facts were never supported by actual proof, and were specifically put in issue by the defendant. It follows from what has been said (*ante*, Point IV, sub-division A, page 8 *et seq.*) this is palpable error; that the Court's jurisdiction having been put in issue, it was absolutely essential that proof be furnished it that it had the authority to proceed with the cause, and the question is upon whom did this burden of proof lie.

It is very true, as contended by this complainant, that if matter *dehors* the bill is set forth in a defendant's plea, the burden of proving its truth is upon the defendant, and no cases need have been cited by complainant to support the self-evident proposition that if a defendant pleads *new matter* in abatement, the burden of proving this new matter is upon the defendant.

This defendant contends, however, that his plea did not set forth any new matter *dehors* the Bill; that his plea simply denied the material and essential allegation of complainant's Bill, the one fact upon which the jurisdiction of the Court was based, viz.: that the defendant owned and held property within the territorial jurisdictional limits of the Court, and that this was a fact which complainant was bound to prove to the satisfaction of the Court before it could assume jurisdiction.

In other words, defendant contends that his plea is strictly a negative one, and that the law is set-

tled that where a plea merely denies a particular allegation in the Bill and does not set forth matter *dehors* the Bill, that the plea is a negative one, and that the burden of proving the issue raised by the replication, the burden of proving the material fact necessary for the Court's jurisdiction to fasten, is upon the complainant.

Street's Fed. Eq. Pr., Sec. 896;
*Vacuum Oil Co.* v. *Eagle Oil Co. of N. Y.*, 154 Fed. Rep., 867; affd. in 162 Fed. Rep., 671,
*Oregon R. & Nav. Co.* v. *Shell*, 143 Fed. Rep., 1004.

In *Vacuum Oil Co.* v. *Eagle Oil Co., supra,* the Court saying:

> "The complainant insists that the pleas are affirmative, and that therefore the burden of proof rests upon the defendant. An affirmative plea is one that sets up some matter *dehors* the bill. A negative plea denies some material allegation in the bill. In the former case the burden of proof rests upon the defendant; in the latter upon the complainant" (p. 869).

Indeed this question is expounded so well in the opinion of the Court below (Record, p. 48), and so little controverted by complainant, that defendant will not take up the time of this Court in any further discussion of this point other than by quoting definitions of an affirmative and a negative plea which it is respectfully submitted are peculiarly apropos. Both of those definitions being taken from Street's Fed. Eq. Pr., which in turn quotes them from Gibson's Suits in Chancery (2nd Edit.), Sec. 323.

Sec. 837, *Affirmative Plea*,

"The logic of an affirmative plea in bar is this: the complainant having omitted from the bill an essential matter of fact, which, if it had not been omitted, would have rendered the bill demurrable, the defendant may, by bringing this omitted essential matter of fact before the Court, destroy the apparent case contained in the bill, and in this way terminate the litigation quickly and cheaply. Thus, a bill may show on its face a good cause of action, setting up many details, and praying for relief. If, however, the bill suppresses the fact that there has been a payment or a release, or a former adjudication, or that the suit is barred by the statutes of limitation, or that any other statutory or equitable defense exists, in any such case the defendant may set up this suppressed fact by a plea in bar, and thereby end the suit."

Sec. 838, *Negative Plea*,

"A negative plea in bar denies some essential allegation contained in the bill, some averment on which the case rests; and the logic of the plea is: that, inasmuch as the complainant's alleged rights all depend on a false allegation of a single essential matter of fact, it is unnecessary for the defendant to answer all the various charges and averments in the bill, when the suit can be ended by a plea denying the allegation of this one essential matter of fact. A negative plea in bar is the opposite of an affirmative plea; an affirmative plea in bar seeks to bring into the case an essential matter of fact which the bill has left out, while a negative plea seeks to strike out of the case an essential matter of fact which the bill has brought in. In other words, an affirmative plea seeks to end the suit by injecting into it a vital fact, and

> a negative plea seeks to end the suit by extracting from it a vital fact. It is plain, that both affirmative and negative pleas in bar are really nothing more than short, pointed answers, intended to confine the litigation to a single issue, that, if decided in favor of the defendant, would end the suit."

B. THE PLEA HAVING BEEN PREVIOUSLY ADJUDGED SUFFICIENT IN POINT OF LAW, AND BECAUSE OF THE FAILURE OF THE COMPLAINANT TO OFFER PROOF CORRECTLY DECREED TRUE IN POINT OF FACT, NOTHING REMAINED FOR THE COURT TO DO BUT TO DISMISS THE BILL.

As the rule is laid down in Street's Fed. Eq. Pr., Sec. 904:

> "So, if a plea is first set down for argument on its sufficiency and held good and then a replication is put in and on proof the plea is found to be true in point of fact, nothing remains to be done but to dismiss the bill. The defendant cannot again controvert the legal sufficiency of the plea (*Eccleth* v. *Southern Cal. Ry. Co.*, 123 Fed. Rep., 836; *Hartz* v. *Cleveland*, 95 Fed. Rep., 681.)"

or as the Court said in *Eccleth* v. *Southern Cal. Ry. Co.*, 123 Fed. Rep., 836 (*supra*):

> "The sufficiency of the plea itself has already been established by the judgment heretofore rendered herein, and if the proof establishes the truth of the facts pleaded nothing remains to be done but to dismiss the bill. That the proof does establish the truth of the matters pleaded in bar of the suit is clear, and, indeed, does not seem to be seriously controverted. It results that the plea must be sustained, and the bill dismissed, at

the complainant's costs. It is so ordered" (at p. 838).

## POINT VI.

**The Bill is defective and should have been dismissed irrespective of any question as to proof, for the Court was powerless to grant the relief prayed for.**

As noted in Point IV these and other questions raised by the defendant were not passed upon by the Court below, as being unnecessary in view of its decision.

A. THE BILL DEMANDS THAT COMPLAINANT BE DECREED ENTITLED TO THE IMMEDIATE POSSESSION OF THE PROPERTY IN SUIT, WHICH THE COURT COULD NOT DECREE.

The Court, sitting as a court of equity, could not assume jurisdiction in a case where it was in no position to enforce its decree.

As is well stated in 16 Cyc., p. 118:

> "Courts exist for the enforcement of rights, not the determination of academic questions. This principle denies to a court of equity cognizance of any suit where its decree would be ineffectual because of territorial limits to the reach of its process."

and at page 125:

> "As equity is without jurisdiction where its decree would through absence of the parties or subject matter be ineffectual."

So that if the Court had assumed jurisdiction herein and the cause had proceeded to a decree, there would have been no way of enforcing it, and the parties would be in the same position as they are to-day. For, as stated in *York County Savings Bank* v. *Abbot*, 139 Fed. Rep., 988:

> "Therefore our jurisdiction, as we have said, still rests entirely on the eighth section of the Act of March 3, 1875, and must be supported by it if at all. Our powers, therefore, do not go beyond what is provided for by that act, so that we have none except to dispose of what may well be called the *res*, and therefore none to issue a personal decree against Martha T. Abbot which would be effectual in law. Consequently, notwithstanding the views which we have heretofore expressed, if the case before us is of such a character that the lien which may be ultimately decreed cannot be made effectual except by some personal act of the respondent which we have not the power to compel, it is too plain to need discussion that the matter of our jurisdiction must be determined by an examination of the underlying question whether we are able to give an effectual remedy in every view of the form which the ultimate determination of the merits may take" (p. 991).

Furthermore, while it is true that all complainant now says he asks is "a decree establishing '*his title*' to property." (Appellant's brief, p. 9.)

That he did not seek "(b.) a decree purporting to attach personal property within the district" (*id*, p. 9).

> "Complainant is not seeking to obtain such a decree" (*id*, p. 12).

The fact remains that by paragraph "Seventh" of his Bill, complainant alleges

> "That by virtue of the said sale had at auction and the conveyance made to your Orator thereof, your Orator *became vested with and is entitled to immediate possession* of the said one-third of one-sixth of the residuary estate," (Record, p. ).

and in his prayer for relief, complainant demands,

> "* * * that your Orator may be declared entitled to the *immediate possession* of one-third of one-sixth of the residuary estate of Gustave J. Wetzlar, deceased, and also to payments of income of the said one-third interest from August 23, 1908, and may pay your Orator the said portion of the said share of Julius G. Wetzlar as may be found to have been unlawfully withheld or diverted from him" * * * (Record, p. 7).

*This, complainant now admits the Court could not decree.* (Appellant's brief, p. 9.)

For while a non-resident claimant against an estate is not limited to his remedies in the State probate courts, but may, in certain cases, bring an action in the Federal Courts, he cannot, as complainant now concedes, issues execution under a judgment thus obtained, or secure or otherwise adjudge any property of the estate, but must come in and share with the State creditors.

The law being well settled that a claim adjudicated by the Federal Courts against the estate of a deceased person, must take its place and share in the estate as administered by the State probate court, and cannot be enforced by process directly against the property.

*Byers* v. *McAuley*, 149 U. S., 608-620;
*Yonley* v. *Lavender*, 21 Wall., 276.

and the following cases cited by appellant.

In all of these cases the defendants were properly before the Court, either by service of process upon them within the district, or by voluntary appearance, or the Court had jurisdiction of the cause by reason of the property being within the district. *A fortiori*, no process can issue in the case at bar, where none of these essentials exist.

This, however, does not seem to have deterred complainant from citing this entire line of cases as authorities, purporting to hold that the Court below should have sustained his Bill, although the most cursory examination of the cases shows that in every one of them the Court had either jurisdiction of the person of the defendant, or that the property was actually and physically within the territorial jurisdictional limits of the Court, and although neither of these essentials are present in the case at bar.

Thus *Ingersoll* v. *Coram*, 211 U. S., 335, cited on pages 8, 11, 12 and 24 of appellant's brief, where the property was within the district, and no objection was made by the defendants as to the jurisdiction of the Court over the parties, and where this Court expressly said:

> "It makes no difference how the parties were served or brought in. Being in, all objections to the bill should be made" (at page 355).

and at page 356:

> "They [the defendants] did not answer as to the jurisdiction of the Court as to par-

> ties, as to the rights of the parties to be sued in district of their residence. The latter objection may be waived, and is waived by not being made."

*Byers* v. *McAuley*, 149 U. S., 608, cited on pages 8 and 11 of appellant's brief, where the property was within the district, and this Court said:

> " * * * Where property is in the *actual* possession of one Court of competent jurisdiction, such possession cannot be disturbed by process out of another court. This doctrine has been affirmed again and again by this Court. (At page 614.)

*Payne* v. *Hook*, 7 Wall., 425, cited on pages 8 and 11 of appellant's brief, where the property was within the district, the estate funds in question being in the possession of the public administrator, to whom it had been committed by the Probate Court.

*Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S., 33, cited on page 8 of appellant's brief, where the property was within the district, and the Court had jurisdiction over all the numerous defendants with the exception of one "Frederick Tilton Davis, averred in bill to be a resident of the State of Alabama and outside of the jurisdiction of the Court" (page 47), but whose presence the Court found "not essential to the jurisdiction of the Federal Court to proceed" (page 49), and the lower Court was therefore directed to

> "proceed to determine the proportion in which the complainant and the Watermans are entitled to share, *without prejudice to the rights of Davis. It may direct the retention of his share in the hands of the ex-*

> *ecutors, to be adjudicated in some other suit* * * *" (at pages 49 and 50). (Italics ours.)

In other words, the Court expressly refused to adjudicate as to a defendant over whom it had no jurisdiction.

*Brown* v. *Pegram*, 143 Fed. Rep., 701, cited on page 13 of appellant's brief, in which Mr. Burr, counsel for present complainant, was one of the counsel, and from the quotation of page 14, of which it appears that the property there in dispute, and the title to which was there adjudicated, was physically "within this district." The opinion of the Court, commencing as follows:

> "Arthur K. Brown is a Receiver of this Court, and has a fund of $40,000 *within the jurisdiction* * * *"

Complainant's contention that the property in the case at bar should be

> "regarded in the eye of the law as in the possession of the Court approaching the executor" (appellant's brief, p. 11)

is considered elsewhere in this brief (ante, Point IV, sub-division B, pages 18 and 19).

B. THE DEFENDANTS ARE SUED AS INDIVIDUALS, WHILE THE PROPERTY SOUGHT TO BE AFFECTED IS HELD BY THEM AS EXECUTORS.

The bill is filed to enforce an equitable lien upon, or claim to, personal property alleged to have been within the jurisdiction of the Court and in the possession of the defendants *as executors*.

A mere reading of the bill, considering not only the title but the entire bill as well, is sufficient to

show that the defendants are sued as *individuals*. There is, however, no allegation in the bill that the defendants, *as individuals*, hold any property which is the subject of the suit; by the very terms of the statute under which jurisdiction is sought, therefore, the Court was without jurisdiction:

> "* * * said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit. * * *" Sec. 738, *supra*.

So that, even if the property were within the jurisdiction, still the Court could not have adjudicated upon it, as it could not enforce a claim against property held by the defendants *as executors*, in a suit against them *as individuals*.

> *Leonard* v. *Pierce*, 182 N. Y., 431;
> *First National Bank* v. *Shuler*, 153 N. Y., 163;
> *United Press* v. *Abell Co.*, 73 App. Div., (N. Y.), 240.
> *New York Code Civ. Proc.*, Sec. 1814,

which is as follows:

> "An action or special proceeding, hereafter commenced by an executor or administrator, upon a cause of action, belonging to him in his representative capacity, or an action or special proceeding, hereafter commenced against him, except where it is brought to charge him personally, must be brought by or against him in his representative capacity. A judgment, in an action hereafter commenced, recovered against an executor or administrator, without describing him in his representative capacity, cannot be

> enforced against the property of the decedent, except by the special direction of the Court, contained therein."

In *Leonard* v. *Pierce*, *supra*, the New York Court of Appeals, at page 432, saying:

> "It has been repeatedly held that persons suing or being sued in their official or representative capacity are, in contemplation of law, distinct persons, and strangers to any right or liability as an individual, and consequently a former judgment concludes a party only in the character in which he was sued. If the judgment was for or against an executor, administrator, assignee or trustee, it would not preclude him, in an action affecting him personally, from disputing the findings or judgment, although the same questions are involved (*Collins* v. *Hydorn*, 135 N. Y., 320; *Landon* v. *Townsend*, 112 N. Y., 93-99; *Rathbone* v. *Hooney*, 58 N. Y., 463-467)."

and citing with approval its decision in *First National Bank* v. *Shuler*, *supra*, where it said, at page 173:

> "But a suit against one sued as an individual does not bind him as trustee, and, conversely, judgment against one sued in a representative capacity does not conclude him in a subsequent action brought by, or against, him as an individual, although the same identical issue is involved, and the decision in the first action was upon the merits (*Rathbone* v. *Hooney*, 58 N. Y., 463; *Landon* v. *Townshend*, 112 N. Y., 93; *Collins* v. *Hydorn*, 135 N. Y., 320)."

## POINT VII.

**The plea not being interposed by defendant for the purpose of delay or vexatiously, if the plea is overruled by this Court, defendant should be granted permission to answer complainant's Bill.**

It is to be noted that no testimony was taken, and that the facts set forth in the plea were not found to be false as a matter of fact.

Considering, therefore, the nature of complainant's Bill, the collateral assignment therein set forth, which is now sought to be enforced as an absolute demand for one-third of the interest of a young man in his father's estate, which said interest amounts to one-half of a trust fund amounting, as found by the New York Supreme Court, to $134,000. *Wetzlar* v. *Wood and Wetzlar* v. *N. Y. Finance Co.*, 143 App. Div., Rep. (N. Y.), 311, at p. 312, it is respectfully submitted that if the plea be overruled, defendant be permitted to file his answer, so that the merits, or rather the lack of merit, of the complainant's cause of action be adjudicated.

Defendant has done nothing contrary to the spirit or the letter of the law, and with all due respect to counsel for the appellant, the statements in appellant's brief

> "The plea attempts to set up a set of facts in violation of the law. The defendant, it

> is said, has '*gone*' to Germany, etc." (p. 24).
> "* * * unless actual embezzlement be proposed on the part of the defendant" (p. 13).

are hardly fair to the defendant, an old German banker of international repute. What act has he committed in "violation of the law"? He has never "*gone*" to Germany. Complainant's bill specifically states that defendant is an alien subject of the Emperor of Germany, and a resident of Frankfort-on-the-Main, Germany (Record, p. 2). He has lived there all his lifetime, and has never been a resident or citizen of the United States; the testator Gustave J. Wetzlar, knew these facts, and his Will expressly authorized defendant to remove any of the trust funds without the State of New York.

> "FIFTEENTH. I authorize and empower the trustee or trustees for the time being under any clause of this my Will in their, or her, or his discretion, to remove from the State of New York at any time any property which shall at the time being form a part of any of the trust estates held by such trustee or trustees, and I likewise authorize and empower the guardian or guardians of the person and estate of each of my children during his minority in their, or her, or his discretion, to remove the personal estate of such child from the State of New York" (Record, p. 19-20).

And such was testator's confidence in the trustees named by him that the Will further provides:

> "TWELFTH. I hereby authorize and fully empower the trustees of this my Will appointed by the several trusts by the preceding articles of this my Will created, or the sur-

> vivor or survivors of them, to invest the whole or any portion of the principal of either or any of such trust estates in real or personal property in the United States or elsewhere, at their discretion and in such securities, bonds, stocks or other personal property as in their judgment will constitute judicious investment of the whole or any portion of such trust fund, not confining them or the survivors of them to such investments as trustees are by law only authorized to make, but having confidence in their good judgment and in their integrity. I do hereby authorize and empower them and the survivor of them to make whatever investment of such trust funds of any sort or description they or the survivors of them may deem advisable to make, and I do hereby will and direct that the said trustees and the survivor of them shall in no case be accountable or chargeable for any loss if any that may happen to such trust funds or to the funds of either of said trust estates by reason of any such investments made by them or the survivor of them in good faith" (Record, pp. 18-19).

The defendant, having therefore acted in all things in good faith, it is respectfully submitted that should this Court overrule his plea, permission should be given him to answer pursuant to Equity Rule 34:

> "If, upon the hearing, any demurrer or plea is overruled, the plaintiff shall be entitled to his costs in the cause up to that period unless the court shall be satisfied that the defendant has good ground, in point of law or fact, to interpose the same, and it was not interposed vexatiously or for delay. And, upon the overruling of any plea or demurrer, the defendant shall be assigned to

> answer the bill, or so much thereof as is covered by the plea or demurrer, the next succeeding rule day, or at such other period as, consistently with justice and the rights of the defendant, the same can, in the judgment of the court, be reasonably done; in default whereof, the bill shall be taken against him *pro confesso*, and the matter thereof proceeded in and decreed accordingly."

As pointed out in the opinion of the Court below (Record, p. 48), *Kennedy* v. *Creswell*, 101 U. S., 641 (1879), cited and quoted by appellant on page 20 of his brief as "singularly close to the case at bar" is based on entirely different facts. There the plea was an affirmative one; here it is a negative one. There evidence was offered by the complainant, and none by defendant; here no evidence was offered by either party. So that to say the least

> "The difference of procedure in that case and in the case at bar is at once perceivable" (Record, p. 48).

And appellant practically admits this on page 20 of his brief, where he qnotes from the Court's opinion in *Kennedy* v. *Creswell* (*supra*).

> "If a defendant pleads a false plea, *and it be so found*, what is next to be done?" (Opinion of Court, at p. 644.)

For in the case at bar it has never been "*so found*"; and as noted in Street's Federal Equity Pr., Sec. 905, in further explanation of *Kennedy* v. *Creswell*, *supra*:

> "It is to be observed of this case that it came up from a Court of the District of Co-

> lumbia, and the equity rules promulgated by the Supreme Court are not effective in that jurisdiction. Consequently, the discussion in this case must be construed in reference to the general principles of equity practice and not with reference to practice in the Circuit Courts under the equity rules" (at p. 547).

Or as the Court said in

> *Westerrelt* v. *Library Bureau*, 118 Fed. Rep., 824,

cited on page 23 of appellant's brief:

> "Neither can the complainants derive any help from *Kennedy* v. *Creswell*, 101 U. S., 641, which they urge on us so strongly, because that case originated in the Courts of the District of Columbia, to which the equity rules of the Supreme Court do not apply. The discussion in that opinion is with reference to the ordinary equity practice, and without any allusion to Rule 34. It is plain beyond argument that in the two cases above cited [*Farley* v. *Kittson*, 120 U. S., 303; *Dalzell* v. *Ducher Mfg. Co.*, 149 U. S., 315], the Supreme Court, without hesitation, although, it is true, without explanation, interpreted Rule 34 as the Circuit Court interpreted it." (At page 826.)

Appellant's contention that:

> "The use of the word 'overruled' in Equity Rule 34, shows that it applies only to the overruling of a plea for insufficiency in law, putting it in the same class as a demurrer" (Appellant's brief, p. 22),

is clearly error, for as pointed out in Street's Fed. Eq. Pr., Sec. 907:

" * * * It will be noted that Rules 33 and 34 are cognate rules. Both contemplate the disposition to be made of demurrers and pleas. As to pleas, Rule 33 provides that they may be set down for argument or may be tried on the issue of fact. It also states the effect to be given to the plea when it is found to be true in fact. As to the effect to be given to the plea when it is found not to be established by proof, Rule 33 is silent. That matter was apparently left to be dealt with in the next rule. Accordingly, in Rule 34 we find this language: 'Upon the overruling of any plea, the defendant shall be assigned to answer the bill.' In the technical language of equity practice 'overruling' a plea is generally understood as referring to the overruling of a plea on argument of its sufficiency, and not as referring to the situation where the plea is disproved and overruled for that reason. It is, however, probable that the word is not here used in any such restricted and technical sense. Rule 34 apparently applies not only to the hearing of demurrers and pleas when the same are set down for argument, but also on the hearing of plea on the issue of fact. If anything else were intended, it would have been easy to qualify the word 'hearing' by limiting it to 'hearing on argument.' Besides, if the rule does not extend to a hearing on the issue of fact, why should the expression 'in point of law or fact' be used in dealing with the question of costs? The interpretation whereby the rule is understood to apply not only to the hearing on argument but also the hearing on the issue of fact, brings the rule into harmony with the second branch of Rule 33, and establishes the principle as regards the *overruling* of a plea on the issue of fact similar to that started in Rule 33 as

regards the *sustaining* of the plea on the issue of fact. That is, the original principle of equity practice is changed as to both. The plea in other words is not now necessarily conclusive in either alternative. If the defendant prevails on the issue of fact, the plea avails him under Rule 33 only so far as, in law and equity, it ought to avail him; if the plaintiff prevails on the issue of fact, the defendant is, under Rule 34, permitted to answer. This is the reasoning which clearly underlies the practice sanctioned in those two cases. [*Farley* v. *Kittson*, 120 U. S., 303 (1887); *Dalzell* v. *Dueber Mfg.*, 149 U. S., 315 (1893)] by the Supreme Court."

In *Westerrelt* v. *Library Bureau*, 118 Fed. Rep., 824 (*supra*), proofs were actually taken and the Court found the fact in dispute in favor of the complainant and against the defendant. Leave, however, was granted defendant to answer complainant's bill upon his plea being overruled, the Court saying:

"* * * we are compelled to accept the action of that Court in *Farley* v. *Kittson*, 120 U. S. 303, and in *Dalzell* v. *Mfg. Co.*, 149 U. S. 315, as conclusively sustaining the order of the Circuit Court now appealed against. The attempted explanations by the complainants of these decisions are in no way satisfactory." (At pages 825 and 826.)

And the Court referring to Bates Fed. Eq. Procedure, Vol. I., page 360, cited on page 23 of appellant's brief, said:

"* * * The author proceeds, at page 361, to discuss the effect of falsifying a plea, and he

> gives the English chancery practice without any reference to Rule 34. In this connection he makes no reference to the decisions of the Supreme Court, which we must accept as decisive of the construction of this rule. Therefore we can give no weight to his discussion, so far as the question now before us is concerned." (At page 825.)

So that the statement in appellant's brief:

> "The Court further point out that in the language of equity practice 'overruling' a plea means setting it aside on a question of law, and that Bates in his Federal Equity Procedure (Vol. I, page 360), states that the usual equity practice has not been altered by Rule 34, where defendant has staked his case on an issue and lost." (at p. 23.)

is, to say the least, a palpable error, for what the Court actually said is:

> "1. Bates Fed. Eq., Procedure, Vol I, page 360, affirms that Rule 33 has changed the practice of the Federal Courts from the old Chancery practice; but this rule relates only to instances where the complainant has hazarded his case on the issue raised by the plea, and has lost. The author proceeds on page 361, to discuss the effect of falsifying a plea, and he gives the English Chancery practice *without any reference to Rule 34*. In this connection he makes no reference to the decisions of the Supreme Court, which we must accept as decisive of the construction of this rule. Therefore we can give no weight to his discussion, so far as the question now before us is concerned." (At page 825.)

**All of which is respectfully submitted.**

HOWARD S. GANS.
Solicitor appearing specially for for the defendant, Emil Wetzlar, for the purpose of this plea, and for no other.
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# CHASE *v.* WETZLAR, EXECUTOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 1045. Submitted April 22, 1912.—Decided May 27, 1912.

Where the jurisdiction of the Circuit Court is dependent, under § 8 of the act of 1875, upon property affected being within the jurisdiction, the defendants not being therein, the fact that the bill was dismissed because complainants failed to prove the existence of any property within the jurisdiction does not affect the right of a direct appeal to this court under § 5 of the act of 1891.

The burden of proof as to the existence of property to be affected by the decree within the jurisdiction of the Circuit Court in order to give it jurisdiction under § 8 of the act of March 3, 1875, c. 137, 18 Stat. 472, is on the complainant.

While averments of some jurisdictional facts may *prima facie* be taken as true where the questions do not address themselves to want of all foundation of jurisdiction, and in such cases the burden is on the one assailing sufficiency or verity, the burden of proving an averment of a fact absolutely necessary to the exertion of the power of the court to render a binding decree is on the party pleading.

The jurisdiction conferred by § 8 of the act of 1875 rests upon a real and not an imaginary or constructive basis.

The Circuit Court does not have jurisdiction of a suit against an absent executor in the State where the will was probated, unless the property to be affected by the decree is actually within the jurisdiction of the court.

The fact that the state court might by virtue of its authority in a particular contingency exert jurisdiction over an absent executor

of a will probated in the courts of that State as to the disposition of property beyond its territorial jurisdiction does not clothe a Circuit Court of the United States with jurisdiction under § 8 of the act of 1875.

THE facts, which involve the jurisdiction of this court under § 5 of the act of 1891 and of the Circuit Court under § 8 of the act of 1875, are stated in the opinion.

*Mr. Charles H. Burr* and *Mr. Frederic W. Frost* for appellant.

*Mr. Howard S. Gans, Mr. Paul M. Herzog* and *Mr. Julius Walerstein* for appellee.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

Suing as a citizen of Pennsylvania, Chase, who was complainant below, made defendants to the bill by which this cause was commenced, Emil Wetzlar and William P. Bonn, alleged to be "alien subjects of the Emperor of Germany, residing in Frankfort-on-the-Main, executors of the estate of Gustave J. Wetzlar, deceased." It was averred that the testator, a naturalized citizen of the United States and a resident of the city of New York, died in 1898; that his will was probated on February 1, 1899, in the Surrogate's Court of the county of New York, and that letters testamentary were duly issued to the defendants. It was further averred that by virtue of the fourth paragraph of the will Julius G. Wetzlar, a son of the testator, was entitled on reaching the age of 25 years to receive a sixth part of the principal of the residuary estate; that such share was invested by the defendants, as executors, in railroad bonds, and they "held the said bonds in the city of New York, as executors, subject to the jurisdiction of your Honorable Court" (the Circuit Court). It was further averred that Julius G. Wetzlar

reached the age of twenty-five years on August 23, 1908, at which time the one-sixth part of the entire residuary estate exceeded in value the sum of one hundred thousand dollars; and that about three years theretofore Julius had mortgaged an undivided one-third interest of such share, to secure the payment of a promissory note for five thousand dollars, bearing interest. On default in payment, it was alleged, the interest so mortgaged was sold in February, 1909, at public auction for the sum of three thousand dollars; and Chase, claiming through the purchaser at the sale, became vested on June 20, 1910, with and entitled to the immediate possession of the said one-third of one-sixth of such residuary estate. The defendants, as executors, it was charged, neglected and refused to pay to Chase the share of the estate in question. A copy of the will was attached to the bill as a part thereof. In the will the defendants were stated to be residents of the German Empire, and express power was conferred upon them to remove the trust estate at any time from the State of New York. The specific relief asked was that complainant might be declared entitled to the immediate possession of one-third of one-sixth of the residuary estate of Gustave J. Wetzlar, deceased, and also to payments of income of the said one-third interest from August 23, 1908, "and may pay your orator the said portion of the said share of Julius G. Wetzlar as may be found to have been unlawfully withheld or diverted from him." There was also a prayer for general relief.

To obtain an order for service outside of the district, an affidavit was made in which it was averred that the bill had been filed to determine disputed claims to a fund which the defendants as executors and trustees held within the jurisdiction of the court, and that defendants were alien subjects of the Emperor of Germany and resided within that Empire, and that neither was within the district and neither had voluntarily appeared in the action.

The court, reciting that it appeared "both by the averments contained in the bill . . . and by the affidavit of . . . complainant . . . that the suit was commenced to enforce equitable liens upon, or claims to the title of personal property within this district, and that all of the defendants are not inhabitants thereof," entered an order on October 25, 1910, requiring the defendants on or before a date named to appear, plead, answer or demur to the bill, and that on or before a named date a certified copy of the order and of the bill should be served upon them wherever found. Presumably in consequence of such service having been made upon him at his residence in Germany, Emil Wetzlar, one of the defendants, appearing specially for the sole purpose of challenging the jurisdiction of the court, filed a plea verified by his attorney and moved the dismissal of the cause upon the ground "that no portion of the property of the estate of Gustave J. Wetzlar and no portion of the trust fund of said estate referred to in the bill therein, is now or has been for at least five years prior hereto, within the city, county or State of New York nor within the southern district of New York nor within the United States, but is and has been in Germany in the possession and control of the said Emil Wetzlar there residing." Argument was heard before Circuit Judge Lacombe upon the sufficiency of the plea. It was held to be "sufficient in law and form," and complainant was allowed to file a general replication thereto.

No proceeding for the examination of witnesses out of court having been taken by either party within thirty days after replication, the complainant set the cause down for hearing upon the pleadings, as authorized by court rule 109. The case was heard before Hazel, District Judge. The previous ruling of Judge Lacombe was followed. It was held that the plea was but a negative one, and that the burden was on the complainant to establish the exist-

ence of the essential jurisdictional facts which the plea traversed, and that as no proof had been offered by the complainant, there was an absence of jurisdiction, and the bill was dismissed. This direct appeal was then taken, the assignments of error being as follows:

"First. That the court erred in sustaining the sufficiency of the plea to the bill in the above entitled cause.

"Second. The court erred in dismissing the bill after hearing upon bill, plea and replication.

"Third. The court erred in refusing to maintain jurisdiction of the above entitled cause.

"Fourth. The court erred in dismissing the bill in the above entitled cause for lack of jurisdiction."

The court also filed a certificate to the effect that the bill had been dismissed for want of jurisdiction, and that an appeal was allowed solely to review such question.

At the threshold it is insisted that there is a want of authority to entertain this direct appeal because the bill was dismissed for lack of proof, and not because of the want of power of the Circuit Court as a Federal court. The contention is without merit. *United States* v. *Congress Construction Co.*, 222 U. S. 199. As the defendants were without the territorial jurisdiction of the Circuit Court, its authority was dependent upon the property sought to be affected being within the district, as contemplated by § 8 of the act of March 3, 1875, c. 137, 18 Stat. 470, 472, which authorizes the exertion of jurisdiction as to property of absent defendants. The ruling clearly, therefore, concerned the power of the court as a Federal court—that is, under the statute—to entertain the case under the circumstances presented.

As, in order to dispose of the merits, it becomes essential to fix the meaning of § 8 of the act of 1875 above referred to, the section is excerpted in the margin.[1]

[1] Section 8 of act of March 3, 1875, c. 137, 18 Stat. 472:

SEC. 8. That when in any suit, commenced in any circuit court of

All the errors pressed upon our attention will be disposed of by considering two questions, the correctness of the ruling of the court below as to the burden of proof, and whether, under the hypothesis that the court correctly held that the burden was on the complainant,

the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district, but within the same State, said suit may be brought in either district in said State: *Provided, however,* That any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

nevertheless error was committed in dismissing the bill in view of the averments therein contained and the admissions made by the plea.

First. *As to the burden of proof.*

On this subject the contention is that although the averment of the bill that the property sought to be affected was within the district was traversed by the plea, nevertheless the defendant was bound to prove the allegations of his plea and hence it was error, in the absence of proof, to dismiss the bill on the assumption that the burden was on the complainant to prove that the case was within the jurisdiction of the court. The theory as to the burden of proof being on the defendant, on which this proposition proceeds, it is insisted, is sanctioned by the following decisions of this court: *Sheppard* v. *Graves* (1852), 14 How. 505; *De Sobry* v. *Nicholson* (1865), 3 Wall. 420; *Wetmore* v. *Rymer* (1898), 169 U. S. 115, and *Hunt* v. *New York Cotton Exchange* (1907), 205 U. S. 322. And a decision of the Circuit Court of Appeals for the Eighth Circuit in *Hill* v. *Walker*, 167 Fed. Rep. 241, is also referred to as containing a full summary of the decided cases on the subject. None of the cases relied upon, however, involved a question of jurisdiction under § 8 of the act of 1875. On the contrary, they all concerned merely the sufficiency or verity of allegations as to the citizenship of parties or the value of the matter in dispute. The cases rested, therefore, upon the proposition that averments concerning such matters were *prima facie* to be taken as true, and hence the burden of proof was cast upon the one assailing the sufficiency or want of verity of such averments. We do not deem it necessary to now consider the conflict of opinion which has sometimes arisen concerning whether the doctrine of the cases relied upon and the fundamental conception upon which those cases rested entirely harmonizes with the provision of the act of 1875 requiring a Federal court of its own motion to dismiss a pending suit

when it is found not to be really within its jurisdiction—see *Roberts* v. *Lewis*, 144 U. S. 653, and the cases cited in the dissenting opinion in *Hill* v. *Walker, supra*—because we think in any view the doctrine is here inapplicable. We say this because while questions concerning the sufficiency or verity of averments as to citizenship or amount in dispute assail the jurisdiction of the court they do not address themselves to the want of all foundation for judicial action because of an entire absence of elements which are essential to the existence of any jurisdiction whatever—that is, the presence of persons or property within the jurisdiction of the court over which its authority may be exerted. The character of the questions involved in the cases relied on and the nature of the rule as to *prima facie* presumption as to the adequacy of averments concerning such subjects, and the resultant burden of proof is at once demonstrated by the well-settled rule that questions of that character do not go to the power of the court to make a binding decree. *Cutler* v. *Huston*, 158 U. S. 423, 430; *Riverdale Cotton Mills* v. *Alabama & G. Mfg. Co.*, 198 U. S. 188, 198.

On the other hand, in a case like the one at bar, the existence of the property within the jurisdiction is essentially necessary to the exertion of the power of the court to render a binding decree. The statute does not leave this to implication, since it expressly provides that the decree to be rendered shall be limited to the property within the jurisdiction which, therefore, forms the sole basis of the power to judicially act. The prerequisite and absolute limitation on power which arises from these considerations is aptly illustrated by the rule enunciated in *Thompson* v. *Whitman*, 18 Wall. 457, and *Pennoyer* v. *Neff*, 95 U. S. 714, and the numerous cases which have enforced the doctrine there laid down. And this wide distinction, in the very nature of things, precludes the possibility of the application here of the *prima facie* pre-

sumption upon which the cases relied upon proceeded and therefore also demonstrates the inapplicability of the theory of burden of proof applied in those cases. In other words, even putting aside for the sake of argument the effect on the doctrines announced in the decisions relied upon of the enactment of the act of 1875 as to the duty to dismiss to which we have referred, the burden of proof to establish that the court was vested with power to act, we think, in a case like this, in the nature of things rested upon the complainant.

Second. *Even although the court rightly applied the burden of proof, did it nevertheless err in dismissing the bill?*

The insistence on this subject is in substance this, that as the plea admitted the probate of the will, the appointment of the executors in New York, and the purchase and possession of the bonds, even although there was no proof that the bonds were actually within the district, the pleadings were adequate to show property within the district, even under the requirements of § 8 of the act of 1875. Asserting that what was sought was a decree establishing "the title" of the complainant to property within the district, counsel argue as follows:

"This narrows the question down to what is meant by property within the district; and it is submitted that for all purposes connected with the administration of an estate, at least that portion of the personal property which was received by the executor within the district is within the meaning of the law within that district. . . . The decree sought is only a determination of the rights of complainant against the estate of Gustave J. Wetzlar, deceased. This estate is, in the eye of the law, within the County of New York, where any and all suits pertaining to the distribution of the estate, and to accounting therefor, must be brought. Respondent cannot, certainly, by setting up an absolutely illegal act (removing the property to Germany), be heard to deny that within the

contemplation of law the estate is for purposes of distribution within the County of New York. . . . The proceeding in this case is a proceeding to enforce an equitable lien upon personal property which is within the intendment of the law *in gremio legis* within this district, and therefore within the jurisdiction of the United States Circuit Court for the Southern District of New York."

It requires no close analysis to sustain the interpretation given by the court below to the statute, viz., that it exclusively deals with property which is within the district where a suit is brought and which property is therefore capable of being made subject to the dominion and resulting control of the court. No other interpretation is in reason possible in view of the terms of the section causing its provisions to come into play only when there is "real or personal property within the district where such suit is brought." The meaning is additionally illustrated by the requirement that the service of the order to appear, etc., must be made not only upon the absent defendant or defendants "wherever found," but also "upon the person or persons in possession or charge of said property," that is, the property within the district and within the dominion of the court which is made the essential foundation for the jurisdiction to be exercised over the property in a case where the court cannot acquire personal jurisdiction because of the absence of the defendant. The meaning of the statute and the limited jurisdiction which it confers is further clearly shown by the provision that an adjudication against an absent defendant or defendants shall "affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

We think there is no basis for the contention that the section contemplates the exercise of jurisdiction by a Federal court upon the assumption of its control over property when there is no property subject to control within

the jurisdiction. In other words the power conferred rests upon a real not an imaginary base. This being true, we are of opinion that a Federal court has not jurisdiction over a person not within its territorial jurisdiction or over property in the custody of such person not within such territorial jurisdiction, merely because a state court may as to such person and such property, because of some proceeding pending before it, have the authority to treat both the person and property as constructively present and subject to its jurisdiction. The power which a state court may exert in a particular contingency affords no basis for the assumption that the act of Congress extends to a subject which the language of the act does not embrace. Indeed, if because a state court had the power to treat in a given case a person and his property outside of the territorial jurisdiction as constructively within it in order to afford particular relief, a like power must be imputed to a Federal court under the act of Congress it would result that in such a case the act of Congress, would become inapplicable, since there would be no absent defendant, as the person as well as the property would be constructively present.

*Affirmed.*